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CASES

ARGUED AND DECIDED

IN

THE SUPREME COURT

OF

THE STATE OF TEXAS,

DURING

THE SESSION OF THE COURT COMMENCING THE FIRST MONDAY IN DECEMBER, 1872.

REPORTED BY

TERRELL & WALKER.

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SUPREME COURT OF TEXAS.

ANNUAL SESSION OF 1872-3.

HON. LEMUEL D. EVANS, PRESIDING JUDGE.

HON. WESLEY OGDEN,
HON. MOSES B. WALKER, } JUDGES.

WILLIAM ALEXANDER, ESQ., Attorney-General.

W. P. DE NORMANDIE, Clerk.

ALEX. W. TERRELL,
ALEX. S. WALKER, } Reporters.

AFTER AUGUST 31, 1873.

HON. WESLEY OGDEN, PRESIDING JUDGE.

HON. MOSES B. WALKER,
HON. J. D. McADOO, } JUDGES.

PREFACE.

THE publication of this volume has been delayed by circumstances beyond our control. The next volume will contain the decisions of the present court for the term ending in July, 1874, and its appearance may be expected in January next.

The delicate responsibility involved in the work of reporting judicial decisions has, with us, been increased by the fact that those whose opinions we here publish had passed from their official positions before our appointment. For such defects as may appear in our method of reporting their decisions, we invoke the charitable judgment of the profession. In some cases more space has been given to the briefs of counsel than we would permit were the work to be done again, but in most instances the professional learning shown in their preparation will compensate for the space allowed.

AUSTIN, October 12, 1874.

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ERRATA.

Read "*Presiding Judge*" for "*Chief Justice*," page 370.
Read P. J. for *Ch. J.*, 371.
Read R. M. "Compton" where R. M. "Browning" occurs as appellant, on pages 192-3-4.

SUPREME COURT OF TEXAS.

TERM OF 1873.

WM. PLATZER v. W. B. NORRIS & Co.

1. The words, "A. B., please pay the above bill," written and signed upon an itemized account, do not constitute a negotiable instrument.
2. If the drawee in a bill of exchange be insolvent at its date, the drawer is liable without diligence.
3. Suit to the first term is a substitute for presentation, protest and notice; and where the latter is excused, it is not necessary to bring suit to fix the liability of the drawer.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

On April 27, 1869, W. B. Norris & Co., appellees, brought suit against the appellant, upon an account, as follows:

"GALVESTON, TEXAS, Sept. —, 1869.

"Mr. WILLIAM PLATZER,

"To NORRIS & Co., Dr.

2 m shingles, @ $6.00	$12 00
3000 feet ast. lumber, @ $25	75 00
500 feet w. boards, @ $25	12 50
Drayage	5 00
	$104 50

"Messrs. Hoffman, Musick & Co., please pay above bill.

(Signed) "W. PLATZER."

It was alleged that upon the sale and delivery of said property, the defendant undertook and promised to pay petitioner the said sum of $104.50 "immediately, and thereupon executed his draft or order upon Messrs. Hoffman, Musick & Co., of said city of Galveston, all of which will appear at the bottom of said bill," as stated above.

By amendment filed March 22, 1872, plaintiff alleged that the order had been presented for payment to said Hoffman, Musick & Co. and they failed to pay the same, of which the defendant had notice, * * and that at the time said order was made said Hoffman, Musick & Co. were notoriously insolvent, and have been since and are now notoriously insolvent; * * that defendant had no funds in the hands of Hoffman, Musick & Co. on which to draw.

The answer of the appellant consisted of a general demurrer, general denial, and pleas in confession and avoidance, especially alleging that the appellees, by reason of their laches and negligence in the premises, had forfeited all right of action and recovery against and from the appellant.

On the trial the plaintiff, after introducing the account and order as above set out, proved by J. Z. Scott as follows: "Hoffman, Musick & Co. were notoriously insolvent on the eighth of November, 1869, on which day they were closed up by the sheriff. * * On the 9th they made an assignment for the benefit of creditors. I am the assignee in bankruptcy of their estate, and know from an examination of their papers and books that they were insolvent many months before November 8, 1869. I had not heard of their insolvency at that date. They were forced into bankruptcy in the month of December, 1869. There has been a dividend declared of ten per cent., and the estate will probably pay twenty per cent."

Argument for the appellant.

The judgment was for plaintiff, and the defendant has appealed.

Gresham & Mann, for appellant.—The errors upon which the appellant founds his appeal are:

1. The court erred in not rendering judgment for the appellant, because the bill of exchange was never presented for payment.

2. The court erred in not rendering judgment for the appellant, because, even if the bill of exchange had have been presented for payment, no notice of its dishonor was ever given to appellant until the institution of this suit, eighteen months after it was given to appellees.

3. The court erred in not rendering judgment for the appellant, because the negligence and laches on the part of the appellees having absolved and relieved him of all liability on the bill of exchange, which was given for the lumber bill, he was, therefore, not liable, under appellees' count in assumpsit, for lumber bought and sold.

First. Before discussing the points made by appellant, we will examine the instrument in writing sued upon and determine its character. Is it a bill of exchange? It is; and we think there can be not the slightest doubt on this point; it was so treated by the court below and by counsel who appeared for appellees. It is an order upon designated drawees to pay absolutely upon demand (the time of payment not being expressed, the law fixes it upon demand), to designated payees, a positive sum of money; is dated at a certain place, and signed by the drawer. That this description constitutes a bill of exchange is, we think, fundamental. (Chitty on Bills, Chapter 5; Story on Bills of Exchange, Chapter 3; Byles on Bills, Chapter 6; Edwards on Bills and Promissory Notes, Chapter 3.)

Presentation or demand for payment. Was it neces-

sary? Yes; we think there is as little doubt upon this point as upon the question of the character of the instrument sued upon. This case, as disclosed by the record, shows that the appellees kept this bill of exchange in their possession eighteen months without making the slightest effort to collect the sum of money it called for; absolutely nothing was done by them until they filed this suit. The record discloses the fact that the appellees had thirty-eight days at least, and probably more, before the failure of Hoffman, Musick & Co., during which the law presumed, in the absence of proof to the contrary, that the bill, if presented, would have been paid. That presentation was necessary and incumbent upon the appellees, the following authorities conclusively show: "The legal effect of drawing a bill of exchange payable to a third person is a conditional contract by the drawer to pay the payee, his order, or the bearer, as the case may be, if the acceptor or drawee, as the case may be, does not." (Byles on Bills, p. 62.) "His contract, under the law merchant, is that if the drawee shall not accept the bill when presented, or shall not pay it when it becomes payable, and the holder shall give him due notice thereof, then he will pay the amount." (Yale v. Ward, 30 Texas, p. 23; Story on Bills, § 107.) "The legal promise of the maker of the drafts was that the drawees would pay the same agreeably to the contents thereof; or in case of their failure so to do, that upon being informed in proper time of the fact, he would pay it." (Fromme v. Kaylor, 30 Texas, p. 757; also, Chambers v. Hill, 26 Texas, p. 473; Nichols v. Blackmore, 27 Texas, p. 587.) "If he did not choose to exercise his right of presenting the bill for acceptance, he was bound to present it for payment when due." (Carson v. Russel, 26 Texas, p. 455.) "To fix the liability of the drawer, it is necessary, on the part of the plaintiff, to prove presentation for payment, refusal to pay, and no-

tice to the drawer; and this legal diligence can only be dispensed with by proof (on the part of the plaintiff, of course) that the drawer had no funds or effects in the hands of the drawees at the time the draft was payable." (Cole v. Wintercost, 12 Texas, p. 120.) "Whether it be a commercial instrument or not, the undertaking of the parties is that the payee will make some attempt at collection." (Pridgen v. Cox, 9 Texas, p. 368.) "There was in this case no acceptance, and no necessity for presentation for acceptance, the bill being in legal contemplation payable on demand. Presentment for payment alone was necessary." (Campbell v. Wilson, 6 Texas, p. 396.)

This last is just our case. The above authorities are certainly sufficient to establish our position as to the necessity of a presentation. This being established, the next question that arises is, when should a presentation have been made? The payees and drawees to this bill lived in the same city. The law requires a presentation within a "reasonable time." What was a reasonable time in this case—both parties living in the same city? The authorities all say twenty-four hours after the delivery of the bill, unless there are usages of trade or other circumstances to justify a longer delay. No such usages or circumstances were proven or appear in this case. To sustain this position it is sufficient to cite the following authorities: Chitty on Bills, p. 380; Byles on Bills, p. 259; Chambers v. Hill, 26 Texas, p. 473.

The next question that occurs is, were the appellees in this case exempt from the necessity of exercising "legal diligence?" It may be claimed by appellees' counsel that the failure of Hoffman, Musick & Co., on the eighth of November, 1869, thirty-eight days after they received the bill, would exempt them from the necessity of presenting

it for payment, that it would have been a useless formality.

We have shown that "legal diligence" in this matter required them to present it for payment within twenty-four hours after its delivery, which would be, by a liberal calculation, on the second day of October, 1869. Did they know on that day, or any time up to the eighth of November, that the drawees were insolvent? Mr. Scott testifies that after he became the assignee of the drawees he then saw from an examination of their books that they had been insolvent many months before the eighth of November, but the public did not know this. The appellees had no reason to doubt the solvency of the drawees. Mr. Scott, from whom the only testimony on this point was obtained, says he had never heard of their failing condition until the eighth of November, nor had he ever heard anything to that effect—not even a rumor. The deed of trust was not of record. Then how can the appellees claim this as an excuse for not exercising "legal diligence?"

Even the failure or insolvency of the drawee, when known (except probably in the case of a bank), will not exempt the payee from the necessity of a presentation. (Byles on Bills, 252, and cases cited in note *c.*) We have shown in the case of Cole v. Wintercost, 12 Texas, p. 120, that this "legal diligence," to-wit, "presentation" and "due notice to the drawer," can only be dispensed with by proof (on the part of the plaintiff, of course), that the drawer had no funds or effects in the hands of the drawee at the time the bill was payable. We will quote still further from the same case, page 123: "Now it is the law that when the holder of the bill undertakes to excuse himself from the rule requiring strict notice of non-acceptance and non-payment, on the ground that the bill was drawn without funds, the burden of proof is upon him,

and he assumes the laboring oar to bring himself within the exception. And it is a presumption of law that the drawer had funds in the hands of the drawee when the bill was drawn."

The appellees have made no such proof, and of course are not exempt, for this reason, from the legal consequences resulting from their failure to exercise "legal diligence" in the premises. What are those consequences? The relief and discharge of the appellant from all liability on account of the bill of exchange sued upon. The law in this matter wisely reasons, that because of the laches and negligence of the appellees in the premises the appellant has been damaged—has been caused to lose—the sum of money called for by the bill of exchange executed and delivered to them.

Second. Even had a demand or presentation for payment been made and proven, due notice of the dishonor of the bill should have been given to appellant, in order to fix his liability. The necessity of giving notice of the dishonor of a bill we have sufficiently and clearly shown in the discussion of the first point made by appellant, and we need only refer to the authorities there cited. Notice is a part of the "legal diligence" imposed by the law in such matters as this under discussion. The necessity of due notice being established, the question occurs, how and when shall it be given, and what constitutes "due notice?" Under our statute the liability of the drawer of a bill of exchange is fixed by giving notice in two ways, first, by suing the acceptor at the first term of the court, etc. (Paschal's Digest, Art. 229.) This method cannot apply to the case at bar, since there is no acceptor to be sued, the bill being payable upon demand. The other method is by protest and notice (Paschal's Digest, Art. 232), and there can be no doubt but that the appellant should have had notice by

this method. At what time should it have been given? We have shown above, that when both payee and drawee live in the same city, demand for payment should be made within twenty-four hours. The law requires notice of dishonor to be made within the same time, to-wit, twenty-four hours after dishonor. (Byles on Bills, pp. 327 and 328, and cases cited in note 1.)

We have now conclusively shown what constitutes "legal diligence" in the matter of "demand" and "notice." The record discloses the fact that this suit was instituted eighteen months after the delivery of the bill of exchange. The appellees prove neither "demand" nor "notice." What then must be the inevitable and legal conclusion in the premises? It can be nothing else than that the appellant is and must be discharged and relieved of all liability on account of this bill of exchange, he having been damaged and forced to lose (as the law, after ages of experience, wisely presumes) the sum of money called for by it.

This loss the law presumes (*vide* last quotation from Cole v. Wintercost, 12 Texas, 123; numerous other authorities could be cited, but it is not necessary, so elementary is the principle), but we are not compelled to rest alone upon this legal presumption (although it is amply sufficient to give us the case), for it is in proof that more than ten per cent., probably as much as twenty per cent., could have been secured at any time up to the trial of this cause, and afterwards, but for the negligence of the appellees. The appellant could not secure it; he had transferred his right to the appellees. The facts in this case amply vindicate the wisdom of the law in presuming damages under such circumstances—a presumption that lies at the very foundation of all commercial transactions, and which, more than any other principle of the law merchant, begets and engenders and keeps alive that vigi-

lance and promptness so important and so vitally essential to commercial success.

Third. The appellant having been relieved of all liability on the bill of exchange because of the course of conduct pursued by the appellees, can it be possible that they have the right to recover the same money under their count in assumpsit for lumber bought and sold, which transaction was the foundation of the bill and in payment of which the bill was given, and which gave rise to and was the cause of its execution and delivery to the appellees? Why did the law exempt the appellant from paying the bill of exchange? Because it presumed that he had been damaged that much—that he had lost that much. Now, will the law compel the appellant to pay the same amount, the same debt (changed only in name), to the appellees when they ask it upon an open account, thereby causing the appellant to suffer a loss of double the original debt, to-wit, loss sustained on bill of exchange by negligence, and amount paid on open account? The law will do no such thing. It would be a mockery of justice; it would be a contradiction. The law would be made to say, "you are relieved of all liability in this matter, and you are not relieved." It would be announcing in one breath the appellant's discharge, and in the next directing, upon the same subject matter, his rearrest. The cases cited by the appellees to sustain their view of the case in this particular all show that the plaintiff had never by his laches (as in this case) lost his right to recover upon the draft or bill, and therefore they have no pertinency or applicability to the case at bar. Counsel for appellant respectfully submit that this case should be reversed and dismissed.

Spencer & Stewart, for appellees, cited 6 Texas, 163, McNeill v. McCamley; 6 Harris & Johnson, Maryland

Reports, 168, Insurance Company v. Smith; 3 Cranch, 311, Harris v. Johnson; 1 Cranch, 72, Clark v. Young; 11 Texas, 455, Sydnor v. Gascoigne; 16 Texas, 128, Insall v. Robson; 2 Story's C. C. Reports, 511; 2 Blackstone's Commentaries, 469; 3 Johnson's Cases, 259, Conrey v. Watson.

OGDEN, J.—This suit was brought in the District Court by the appellees against the appellant, upon an account for a bill of lumber, and an order given by appellant upon the house of Hoffman, Musick & Co., to pay the amount of the bill. The account is rendered in September, 1869, and the order entered at the bottom of the account is without date, as follows: "Messrs. Hoffman, Musick & Co., please pay above bill." Hoffman, Musick & Co., not paying the bill, and having become bankrupts, this suit was instituted against the original debtor and the maker of the order. Judgment having been rendered against him, he has appealed.

The only question raised in the assignment of errors, which need be noticed here, is in regard to the non-presentation of the order to Hoffman, Musick & Co. for payment, and the want of protest for non-payment and notice to the drawer. Our statute provides two modes for fixing the liability of the drawer and indorser of commercial or negotiable paper. The first is by protest, and the other is by bringing suit at the first term of the court, or at the second term, and by showing good cause for not bringing suit at the first term. And the holder has, in all cases, the choice of pursuing either or even both remedies. But the instrument here sued on is neither commercial paper, properly speaking—for it is without date and without a payee—nor is it a negotiable instrument. Hoffman, Musick & Co., were not bound to pay, and could not have been sued on the order, and certainly neither Platzer nor

any one else could have been held liable on the order if detached from the account. That order, therefore, can be regarded as but little more than an acknowledgment of the justness of the account; and we think it may be considered quite doubtful whether a protest or suit at the first term of the court was necessary in order to fix appellant's liability. But if we regard the instrument in the most favorable light for appellant, and consider it as a bill of exchange, then the holder would certainly have the right to bring suit, under the statute, instead of protesting it for non-payment (Art. 229, Pasch. Dig.); but he could not have sued Hoffman, Musick & Co., for they were not requested to accept, but to pay on demand, and they did neither. But it is also clearly established, that within about one month from the making of the order, Hoffman, Musick & Co. were notoriously insolvent, and were bankrupts; and if they had accepted the order on the day of the execution, yet the holder need not have sued them after their bankruptcy, in order to fix the liability of the maker. (Insall v. Robson, 16 Texas, 128.) His liability was fixed by the insolvency of the drawee, and he cannot now complain that he was not sued as soon as he might have been.

The diligence by bringing suit, as prescribed by the statute, in order to fix the liability of the maker, is a substitute for demand, protest and notice, as required by the law merchant. (Sydnor v. Gascoigne, 16 Texas, 456.) If, therefore, suit was brought against the maker at the first term, or if the drawer became notoriously insolvent before the first term, after the maturity of the draft, in either case the liability of the maker became absolutely fixed, and he has no right to complain of the laches of plaintiffs in prosecuting this claim against himself. Appellant claims that he has been damaged by the laches of appellees in prosecuting their claim; but he has failed to

prove any damages, and under the circumstances we think it would be difficult to presume he has sustained any. There is no error in the judgment, and it is affirmed.

AFFIRMED.

THE STATE OF TEXAS v. THE GALVESTON CITY COMPANY.

1. After a recognition by the government of a grant to the extent of its boundaries for over thirty years, no cancellation of the same can be obtained on account of an excess of land covered by the grant.
2. The intent to mislead and defraud, and that the party was misled and defrauded, are necessary allegations in a petition to constitute a sufficient charge of fraud.
3. When a patent to land has been issued by the President of the Republic and Commissioner of the General Land Office, and was recognized by subsequent legislation of the Congress of the Republic, the State of Texas is estopped from denying the right of those claiming under it to the full extent of the boundaries set out in the patent.

APPEAL from Galveston. Tried below before the Hon. C. B. Sabin.

A general demurrer to appellant's petition was sustained in the court below, from which an appeal was taken. The character of the petition is sufficiently stated in the opinion.

Mann & Baker, for appellant.—The principles of law, that issuance of a patent is a ministerial, not judicial act—that if issued fraudulently, or without authority, or contrary to law, it is absolutely void and conveys no legal title as between grantor and grantee, has been fully established in Texas as well as in England, in the Supreme Court of the United States and in many of the States, as will appear from an examination of the following cases: Mason v. Russel, 1 Texas, 729, which cites and approves

Stoddard v. Chambers, 2 How., 318; The State v. Delesdenier, 7 Texas, 109; Hancock v. McKinney, 7 Texas, 440; Johnson v. Smith, 21 Texas, 729; United States v. Stone, 2 Wall., 535; Huidekoper v. Burrus, 1 Wash. C. C., 113; Cromlin v. Minter, 9 Ala., 605; Barwick's case, 3 Coke's R.; Lord Chandos' case, 6 Coke's R., 55.) In support of the proposition that a patent is but evidence of title where land has been purchased and granted by act of the Legislature, see the cases above cited, and in addition the case of Goodlet v. Smithson, 5 Port. (Ala.), 248; McConnell v. Wilcox, 3 Illinois Reports (1 Scam.), 367.

Under this view of the law, how stood this matter at the time of the adoption of the Constitution of the State in 1845? Appellee had an inchoate right, by grant from the Republic, to a league and labor of land on and including the east end of Galveston Island; the right was inchoate, because the metes and bounds of the land had not been established according to law. The title to that amount of land had vested by the grant; the evidence of title which was to designate the boundaries not mentioned in the grant would be a patent. This they did not have; their pretended patent being absolutely void, in their hands, for want of the prerequisite survey, and by the actual fraud of grantee taking, knowingly, more than it was entitled to; the excess embraced in the pretended patent was then, as it is now, a part of the public domain, and as such passed with the other lands of the Republic to the State. (See Articles of Annexation, Pas. Dig., 1st Ed., p. 44.) Passed, not by escheat or forfeiture, as argued for appellee, but simply as part of the unsold and ungranted land.

The second ground of demurrer urged by appellee in the court below was that there are no allegations in petition that will sustain the charge of fraud. The petition

alleges that no survey was made of the land described in the pretended patent; that the metes and bounds therein given are of such a nature that they do not show the quantity of land embraced by them, nor could it be ascertained by calculation, but would require an actual survey to ascertain it. That said metes and bounds contain an excess of 1700 acres over and above the quantity purchased and granted, and these facts were known to grantee and Commissioner of Land Office. Any act or omission of a legal duty, whereby undue advantage is taken of another, is fraud in equity. (Story's Eq. Jur., Vol. 1, Sec. 187.)

The case of Elliott v. Mitchell, 28 Texas, 111, decides that where there has been actual survey that grantee holds excess unless it be so great as to be a presumption of fraud. But stress is laid upon the fact that there was a survey. In White v. Burnley, 20 How., 248, where one locator in Texas was seeking to have a prior location set aside because of excess, in which the evidence was that the surveyor had knowingly returned field notes for more than the quantity of land granted, the Supreme Court of the United States says: "There is not the slightest evidence that Morales had any knowledge that the statement made by the surveyor in his certificate of survey was untrue, and therefore the grant as to him was not void."

Why would it have rendered the grant void for him to have known of the excess, if such knowledge is not fraud? It has been said by counsel that mere knowledge of excess is not fraud; that a fraudulent animus must be shown. Men are conclusively presumed to intend the necessary results of their actions. (Greenleaf on Evi., 1 Vol., Sec. 18.) After having taken 1700 acres, then, at rate paid for the league and labor, worth over $16,000, now worth over half a million, can they retain it by disclaimer of fraudulent animus? How can we show the

animus but by their acts, and that they were done with knowledge? .(Kerr on Frauds, 41, 42, 55.)

We allege that no survey was made, and on demurrer this would prevent the argument from being entertained, that the Secretary of the Treasury made a survey, and that a patent could issue.

Appellee claims that as there was no general land law at the time this land was granted, and as the grant does not state any further prerequisite than the payment of the purchase money, that therefore the patent was legally issued, even if there was no survey and no compliance with the requirements of the general land law. Supposing that prior to passage of general land law a patent might have issued without a survey—which we don't believe—still we hold that the law, as it stood at the date of its issuance, must be complied with. The law that governs all ministerial acts is the law of the date of those acts.

The act of 14th December, 1837, provides county surveyor shall certify all field notes which have been or may hereafter be made upon which patents are to be obtained. (Paschal's Digest, 1st Ed., Art. 4522.)

Another point argued for appellee was that excess don't avoid a patent. Our claim is on two grounds: 1. That their patent is void for fraud in obtaining it, and because issued contrary to law, and that the excess is the consequence of that fraud. 2. That fraud may be presumed from amount of excess, and that a patent may be opened on that ground by the State.

It was further claimed for appellee that the State's rights have been barred by limitation, and if not, that the demand is stale and lost by laches. Neither limitation nor laches apply to claims of the State of Texas for land. (Pas. Dig., 1 Ed., Art. 4624; Angel on Limitation, Secs. 34, 37.)

There is only one ground on which the claim of the

State can be affected by the lapse of time, and that is on the presumption of a grant. This is a presumption of fact, and must necessarily be consistent with the other facts in the case. (See Taylor v. Watkins, 26 Texas, 696; Yancy v. Norris, 27 Texas, 49.) In the case at bar, appellee is claiming possession of all the land under a grant of a certain specific quantity, and they cannot say they have no more than the amount granted; but if they have, then lapse of time has raised presumption of grant. Such an argument would be totally inconsistent.

If the State was in no better position than an ordinary vendor, still time would not have affected her rights at law or in equity, as there has been fraud in obtaining the excess, and concealment of fraud in retaining it. (See Munson v. Hallowell, 26 Texas, 486.) The concealment consisted in preventing any suspicion of the true state of facts from arising, by denying, as they do now, that they have any excess. But they say that the stockholders of the City Company are purchasers without notice. As the demurrer presents all substantial defects in the whole pleadings (Gould on Pleading, Chap. 9, Sec. 36) we can properly consider this plea. No principle of equity is better settled than that there can be no innocent purchaser of an equitable title. (Boon v. Childs, 10 Pet., 179, 211, 212; 2 Story's Eq., Sec. 1502; Vatier v. Hind, 7 Pet., 252, 271.) The stockholders of a company whose capital is land, if they can be called purchasers of the land when they buy but certificates of stock, would get but an equitable title in the land, the legal title being in the corporation. Besides, we are not suing the stockholders; we know no one but the City Company. The attribute of individuality by which the personal identity of the members was merged in the body corporate, the company, was the privilege granted by incorporation, and the members cannot be heard to say that they, as such, have any rights,

as to third parties, separate or different from the company. As between themselves, the members can set up any equities that may arise; but no case can be found where the members have, in suit by a third party, been allowed to allege any defense which could not be urged by the body corporate.

In the case of Mason v. Russell's Heirs (1 Texas, 729) Judge Lipscomb quotes from Stoddard v. Chambers, 2 How. U. S., 318, as follows: "It is true a patent possesses the highest verity. It cannot be contradicted or explained by parol; but if it has been fraudulently obtained or issued against law, it is void. It would be a most dangerous principle to hold that a patent should carry the legal title, though obtained fraudulently or against law."

"The issuing of a patent is a ministerial act, and must be performed according to law; if issued against law it is void, and those claiming under it acquire no right." (The State v. Delesdenier, 7 Texas, 109.)

"No title can be held valid which has been acquired against law. A patent which has been fraudulently obtained or issued against law is void." (Hancock v. McKinney, 7 Texas, 440.)

"A patent for land in this country is the act of a public officer, who acts under a special authority delegated to him by law, and which prescribes the terms upon which it is to be granted." (Huidekoper v. Burrus, 1 Wash., 66, 113.)

"The patent is not understood to be the title itself, but the evidence thereof." (McConnell v. Wilcox, 3 Ill. R., 1 Scam., 367.)

"In case of sales made by the United States, the law gives the right, and the patent may be considered, not as the title itself, but as the evidence by which it is shown

that the pre-requisites to a legal sale have been complied with." (Goodlet v. Smithson, 5 Port., Ala., 248.)

"It is true that patent possesses highest verity. It cannot be contradicted or explained by parol; but if it has been fraudulently obtained, or issued against law, it is void. It would be a dangerous principle to hold that a patent should carry the legal title, though obtained fraudulently or against law. Fraud vitiates all transactions. It makes void a judgment, which is a much more solemn act than issuing of a patent." (Cromlin v. Minter, 9 Ala., 605; Stoddard v. Chambers, 2 How. U. S., 318; United States v. Stone, 2 Wall., 535.)

Ballinger, *Jack & Mott*, and *Gray & Botts*, for appellee.—If this suit can be maintained, there is scarcely a land grant in the State of Texas but is the subject of a like suit.

The People v. Clark, 10 Barbour, 130, was a case of a *scire facias* in the State of New York to vacate a patent to lands granted under the British crown. Says the court:

"Every man who, on the twentieth of April, 1827, owned an inch of land in this State, held it under a grant from the king, or under a Dutch grant; and who for a moment can suppose that the men who made and sanctioned the Constitution would have consented to it, if they had understood that their title to the lands on which they had lived for forty years might at any time, before the year 1850, be taken from them or their children, because the king had been cheated in the year 1737?"

The language by which the State of New York asserted, in 1779, its rights as possessed by the king, was:

"That the absolute property of all messuages, lands, tenements and hereditaments, and all rents, royalties, franchises, prerogatives, privileges, escheats, forfeitures,

debts, dues, duties and services, by whatsoever names respectively the same are called and known in the law, and all right and title to the same, which next and immediately before the ninth day of July, A. D. 1776, did vest in or belong, or was or were due to the crown of Great Britain, be and the same, and each and every of them, hereby are declared to be, and ever since the said ninth of July, A. D. 1776, to have been and forever shall be vested in the people of this State, in whom the sovereignty and seignory thereof are and were united and vested on and from the said ninth of July, 1776."

Says the court: "There are no words in this section sufficiently broad to cover the claim now made by the plaintiff. * * Can it be supposed that they intended to disturb each other's title to lands which they respectively then held under the crown? They did not profess to claim every right of action which the king then had."

It is not only clear that no such right of action exists in the State as is claimed in this case, but its legislation has been careful to protect its citizens from annoyance from any like objections.

2. No fraud is shown in the procurement of the patent.

The demurrer admits only the allegations of the petition which are well pleaded. Those allegations are construed most strongly against the plaintiff.

General allegations of fraud cannot be regarded unless facts are shown which render the fraud apparent to the court.

Nor can averments be regarded which are repugnant to law and to the judicial knowledge of the court.

The alleged fraud consists in the charge that the patent was not based on "any data whatever from actual survey of the east end of Galveston Island to ascertain the land granted." That the metes and bounds were the sugges-

tion of Jones, and a combination between him and the Commissioner of the Land Office, Borden.

The facts of the case shown from the public laws of the State are, that on the day succeeding the act making the grant to Menard, an act passed declaring that "all islands belonging to the Republic shall be and are hereby reserved for the government use, except the President be authorized specially by Congress to sell them." (Digest, Art. 4248.)

On the twelfth of June, 1837, it passed "the act to dispose of Galveston and the other islands of the Republic of Texas;" which provided—

"That the Secretary of the Treasury be and he is hereby authorized and required to cause the island of Galveston, except the league and labor sold to M. B. Menard and associates, and all other islands within this Republic, to be surveyed in lots not less than ten nor more than forty acres each, and that he cause the same to be sold at auction to the highest bidder, on the second Monday of November next, at the State house in the city of Houston," etc. (Digest, Art. 4828.)

That this survey was made and sales took place are apparent from the legislation of the State (Art. 4249), and its judicial history. (State v. Delesdenier, 7 Texas, 102, 103; Franklin v. Kessler, 25 Texas, 142.)

3. No excess is shown to affect the patent made by the Republic.

It is apparent that in the computation of excess the "flats" are included. But the petition states that the area of the flats cannot be alleged. There is no averment of excess of "fast" land beyond a league and labor. The averment of excess is therefore attributable to the inclusion of the flats. But the Supreme Court, in a case of the greatest consideration, held that the flats—that is, the land covered by shallow water between the fast land and

the channel of the harbor of Galveston—were intended to pass as a necessary and indispensable incident and appurtenant to the grant to Menard and his associates by the Congress of the Republic. (City of Galveston v. Menard, 23 Texas, 349.)

Averments as to excess are: "That said patent included, in the metes and bounds given in it, seventeen hundred acres more than a league and labor; that Jones, Menard's agent, and Borden, the Commissioner of the Land Office, knew that the patent embraced and contained very many more acres than the league and labor.

"That the patent has for one of its metes and bounds the channel of Galveston Bay; that owing to the meanderings of said channel, the truth or falsity, correctness or incorrectness of said metes and bounds, and the amount of such gross excess, fraudulently obtained as aforesaid, cannot be ascertained by calculation without a survey."

Courts regard allegations with reference to the means of knowledge of the facts, and it is manifest that the allegations of excess are wholly conjectural, the petition admitting ignorance of the facts, that a survey was necessary to ascertain them; the character of the suit, in fact, being to obtain a survey in order to determine whether or not any excess existed, and the amount thereof.

The question then arises, what excess in a patent would render it liable to be avoided in a suit by the State? This is an inquiry in which, if your honors enter upon it, you will have the distinction of being the first explorers in this branch of the law. It is, to this day, in England and in the United States, an untried, unknown experiment. In the case of White v. Burnley, 20 How., 247, Judge Catron says: "No instance is recollected where the State has interfered by suit to reform a patent for excess in quantity." It is true he expresses the opinion that a case of excess

sufficiently gross could arise to justify a proceeding by suit to reform a grant, but the authority he cites for this is United States v. Hughes, 11 Howard, 552, a suit by the United States to cancel a patent which had been issued to the wrong person.

In a later case decided by that court, Lindsey v. Hawes, 2 Black, 559, a fractional survey supposed to contain five acres actually contained thirteen acres, and the court held the government bound by the survey, and that a claimant under the United States could not obtain any right to the excess; and Mr. Justice Miller thus carefully states the limits of the power of the government itself:

"We do not deny the right of the government, which has sold land by the acre at a fixed price, to make a new survey before it parts with the title, and if there is more land than was paid for, to require the deficiency to be paid before it issues a patent."

The court say, in Hickman v. Tait, Cooke's Reports, 463: "If the estates of purchasers and families depended on resurveys of old patented lands, fatal would be the consequences to the peace of men. * * These boundaries were made by an officer of the government, in whose acts the citizens are commanded by the fundamental laws of society to place confidence."

We have searched the reports with care, and whilst dicta can be found asserting the right of the State to such an action, the action has never before been brought. Says Coke: "As usage is a good interpreter of laws, so is non-usage. Where there is no example, it is a great intendment that the law will not hear it."

"The fact that plaintiffs have never before this commenced an action to vacate a grant made by the king because it was made upon false suggestions, furnishes strong evidence that the plaintiffs never had the right to bring such an action. It was Littleton's rule, 'Whatever never

was, never ought to be.'" (1 Vern., 385; People v. Clark, 10 Barb., 143.)

This was the first grant made by the Republic of Texas, before it had any new land system, and before the offices of county surveyor were filled.

The court will take judicial knowledge of the usages of the times. It may not judicially know the *locus in quo* beyond what it has already judicially ascertained; but it will presume that officials of that day knew their duties and performed them, unless the contrary is made plainly to appear. * * * * * * * *

Admitting a clear excess of 1700 acres of land, proper to have been computed as part of the grant, this gives no right of action in this case.

On this point we add a few observations. What excess entitles the State to an action for its recovery?

This court must feel at a strange loss for guides in such an inquiry—to take the place of the actors then, surround itself with all the circumstances presented to them, and demark the line of official authority. You will recognize the essential difficulty and the great danger of wrong involved, which to this time have prevented any such question from being brought to the decision of an English speaking court.

We submit that it must be an excess so gross as plainly to appear beyond the usage, discretion or jurisdiction of the authorities at the time. The terms in 5 Haywood are well chosen. It must be "an enormous and very extraordinary excess." Indulging the presumptions which always attach in behalf of official acts, taking cognizance of contemporaneous official usage and practice, there must appear to have been a gross abuse of official authority and power.

"In the location and survey of claims arising under acts of Congress, like those of May, 1820, and May, 1823,

the executive department of the government has in general exclusive jurisdiction, and all questions arising upon their location and survey are administrative in their nature, and must be disposed of in the Land Office." (Ballance v. Forsyth, 24 How., 185.)

"Where a survey is necessary to a grant, this belongs to the executive department, and is binding and conclusive on the judiciary, except where it interferes with the vested rights of third persons." (Waterman v. Smith, 13 Cal., 373, 411, 416.)

"The duty of surveying is political, and cannot be interfered with by the judiciary, which can determine whether prior rights have been interfered with, but cannot correct the location nor locate it where it should have been originally made." (Moore v. Wilkinson, 13 Cal., 486.)

4. The Republic and State of Texas have recognized and confirmed the patent to Menard, and it does not remain open to question.

In the case of The City of Galveston v. Menard (23 Texas, 404), the court say:

"The act of Congress of the fifth of February, 1840, incorporating the city of Galveston, defines its corporate limits by reference to the patent, as follows: 'All that section of territory lying between Seventh street and Thirty-first street, including the harbor and anchorage of Galveston, and running from the front line on the bay, as defined in patent or deed to the Galveston Company from the government of Texas, to the Gulf, between the streets aforesaid.' Here is a recognition on the part of the Congress that the title to Menard to the east end of Galveston Island had been made by a definite line, constituting the front line of the bay, in reference to the harbor or anchorage. This is at least evidence that the government understood the grant to Menard to extend to the

channel. And if satisfied it was excessive, such a confirmatory reference would hardly have been made to it by the Legislature."

The court further refer to the act of February 16, 1852, supplementary to an act granting certain powers to the city of Galveston, which declared that said act shall not be "so construed as to alter or impair any of the rights heretofore conveyed to Michael B. Menard, his heirs and assigns, by patent from the Republic of Texas, dated the twenty-fifth day of January, A. D. 1838," as a recognition of the patent, and construction of Menard's rights under the patent.

It is impossible that language can be more plain, not only in recognition of the patent itself, but as a patent from the Republic of Texas.

On the sixteenth of May, 1871, the Legislature enacted a charter for the city of Galveston, which declared, Article 30, "This act shall be deemed a public act, and may be read in evidence without proof, and judicial notice shall be taken thereof in all courts and places.".

Article 11, Section 1, provides, "That the limits of said city shall embrace so much of the island of Galveston from the point thereof on the east to Fifty-sixth street; or to include the league and labor of land known as the Menard grant; *provided*, that said league and labor shall extend beyond Fifty-sixth street."

The Legislature can recognize and confirm even a title absolutely null and void. (Wilkinson v. Leland, 2 Peters, 627.)

In United States v. Freeman, 3 How., 565, the court say: "If it can be gathered from a subsequent statute in *pari materia* what meaning the Legislature attached to the words of a former statute, they will amount to a legislative declaration of the meaning, and will govern the construction of the first statute."

Edwards' Lessee v. Darby, 12 Wheat., 206, turned upon the validity of certain surveys made by commissioners in North Carolina, reserving salt licks and springs from survey. Some of the surveys did embrace salt springs. Subsequently the Legislature ordered the survey and sale of all salt licks and springs, except such as had been already surveyed. The court say:

"This provision must be construed as recognizing the validity of, and as ratifying the surveys made by the commissioners. The circumstance of the survey containing a considerable surplus, we think immaterial."

Commonwealth v. Penobscot, Proprietors, 10 Mass., 153, was an information on the part of the commonwealth claiming lands as public. The defendants claimed under a conveyance from Indian Sagamores, and a legislative confirmation thereof, as follows: "*Resolved*, That the twenty miles falls, so called, * * be and they are hereby considered the uppermost falls, * * referred to in the deed from Indian Sagamores," etc. The court held that the Legislature, with special reference to the instrument, had recognized it as a deed, and fixed a call in it; and that as expressing an opinion, or as confirming the grant, the resolution was a legislative recognition of the Indian title.

In Vidal v. Girard's Executors, 2 Howard, 190, the Supreme Court of the United States held that an act of the Legislature, prohibiting any road or street to be laid out through land bequeathed by the late Stephen Girard for the erection of a college, without the consent of the trustees, was a legislative recognition of the validity of the trusts in Girard's will for the establishment of Girard College.

Lewis v. San Antonio, 7 Texas, 288. The city of San Antonio claimed six leagues of land to have been granted as *exidos* to the town in 1733 or 1734. The Congress of

Coahuila and Texas granted the city two leagues, and it was contended that this was intended and accepted as a limitation of their *exidos*, the government having granted other parts of the six leagues.

By an act of the Congress of the Republic, passed December 14, 1837, the lands, limits and jurisdiction of the city were made to include and comprehend all that tract of land originally granted to and comprising said city, with its precincts; and the council and justices of the county court were authorized to sell such public lots and parcels of land as may lie within their jurisdiction, and to which there is no legal claim or title, and to dispose of such houses, or other buildings, as may have formerly been the property of the corporation of said city. The original grant and its validity were denied.

Judge Lipscomb says, page 140: "It is not to be supposed that the fact of the claim of ownership of the land in question was unknown to the members composing the Legislature, and their action must have had reference to it." Again he says: "If the original grant of the six leagues was proved, but was inchoate and imperfect, the act confirmed it."

See also Melton v. Cobb, 21 Texas, 541; Freidman v. Goodwin, 1 McAllister, 147; Noble v. The State, 1 Iowa; Breckenridge's Heirs v. Ormsby, 1 J. J. Marsh, 255; Wilcox v. Jackson, 13 Peters, 514.

5. The State is estopped and barred by its delay and acquiescence of more than thirty-three years, and by the equitable circumstances of the case, from denying the validity of the patent to Menard.

The principles of estoppel bind the State. (Commonwealth v. Andre, 3 Pick., 224; Carver v. Astor, 4 Peters, 1, 87; Penrose v. Griffith, 4 Binney, 231; Nieto v. Carpenter, 7 Cal., 527; Magee v. Hallett, 22 Ala., 699; Bigelow on Estoppel, 277; Com. v. Smith, 4 Penn. Law

Jour., 120; 1 Wharton's Digest, Estoppel, 121; Commonwealth v. Moltz, 10 Barr, 530; White v. U. S., Devereux Rep., U. S. Court of Claims, 54; Swain v. U. S., Ib., 61; Spence v. U. S., Ib., 60; Erricson v. U. S., Ib., 61.)

The rules applicable to the government when it acts merely through ministerial officers in execution of general laws, and when it assumes the special character of a contractor, and acts by the particular expression of the legislative will, and through special agents, as a holder of property or rights of any kind, are essentially different.

In the latter it is subject, and peculiarly subject, to the rules which apply to individuals in the construction of their contracts and conduct. (Huidekoper's Lessee v. Douglas, 3 Cranch., 1; Bank U. S. v. Planters' Bank of Georgia, 9 Wheat., 904; U. S. v. Barker, 12 Wheat., 589; Bank of Kentucky v. Wister, 2 Peters, 318; People v. Clark, 10 Barb., 140; Bank U. S. v. McKenzie, 2 Brock, 392; Betts v. Ammonett, 4 An., 363.)

The legislative act required the President to issue the patent to Menard. This patent was in the public records. It was bound to know how he had performed that duty.

"I take it to be indisputable that a principal who neglects promptly to disavow an act of his agent by which the latter has transcended his authority, makes the act his own." (Gibson, C. J., Bredin v. Debarry, 14 Serg. & R., 30; Childs v. Digby, 12 Harris, 23.)

6. The State is barred by limitation and prescription. (Jones v. Borden, 5 Texas, 411; Lewis v. San Antonio, 2 Texas, 288; Herndon v. Cassiano, 7 Texas, 288; Paul v. Perez, 7 Texas, 338; McDonald v. Bell, 7 Texas, 378; Dangerfield v. Paschal, 11 Texas, 579; Morris v. Byers, 14 Texas, 278; Taylor v. Watkins, 26 Texas, 688; Yancey v. Norris, 27 Texas, 40; Walker v. Hanks, 27 Texas,

536; Ballard v. Perry, 28 Texas, 366; Mills v. McMaster, 30 Texas, 594; Galan v. Goliad, 32 Texas, 787.)

The statute of limitations of adverse possession for three years under title or color of title, of five years under a recorded deed, or of ten years as a naked trespasser giving title to six hundred and forty acres, does not bar the government. There is no positive, statutory bar. But the inference from thence that no limitation, no lapse of time, will bar the State is wholly illogical and unfounded. No statute applied formerly to the courts of equity, but they adopted a bar by analogy to the rules which governed courts of law. The question at common law was considered by this court in the cases in 7 Texas, and in State v. Purcell, 16 Texas, 305, and it was shown that presumptions were raised against the crown by analogy to the bar of the right of entry, and that the longest period fixed by our statutes would raise the "presumptive bar" even against the State.

The length of time and the circumstances which raise the bar have led to subsequent discussion, but we understand it to be the settled law of the court that a "presumptive bar" does exist. The lapse of time in this case certainly creates it.

The statute of limitations may not fix an express bar, but it furnishes the principles, the analogies by which the courts of this State, in the exercise of their equity powers, will be governed in its determination.

OGDEN, J.—The appellant brought this suit to recover certain lands claimed by the appellee on the east end of Galveston Island.

The petition alleges that in January, 1838, in compliance with an act of the Congress of the Republic of Texas, passed for that purpose, a patent or quit-claim deed issued from the Republic to M. B. Menard, his heirs

and assigns, who, upon the formation of a joint stock company called the Galveston City Company, had transferred to it his entire interest in and to the grant made by the Congress of the Republic. It further alleges that the patent or quit-claim deed issued to M. B. Menard contained a large excess of land over and above what the patent called for, and that the patent or deed was made to contain this excess of land through the fraudulent combinations and representations of the agent of M. B. Menard and the Commissioner of the General Land Office. The act of the Congress of the Republic of 1836, relinquishing to M. B. Menard one league and labor of land on the east end of Galveston Island, and authorizing the President to issue a quit-claim title to the same, and the patent issued by the President, in comformity therewith, on the twenty-fifth of January, 1838, are made a part of the petition.

The defendant filed a general demurrer and several special exceptions to the petition, which were sustained by the court, from which judgment the plaintiff has appealed.

The title to the land in controversy issued from the Republic of Texas, as a sovereign and independent State, with every attribute of nationality and power, whose sovereignty continued for about eight years after the issuance of the title to Menard; and the grant evidenced by the patent or deed was by specific metes and bounds.

There can be no doubt in regard to the authority of the Republic to make the grant and to recognize the boundaries as described in the title; and it was immaterial whether the title issued by the President contained more land within its boundaries than designated or not, if the then existing government, with a full knowledge of that fact, recognized and approved the same. Upon the issuance of the title papers, definitely describing the land

granted, the title to the extent of the defined boundaries passed and became vested in the grantee, subject to no inquiry or dispute from a party, but the government itself. Had that title been fraudulently obtained, or had it by any fraudulent representations or combinations been made to include or cover a large excess of land, whereby the government was defrauded and deprived of a valuable right, we think there can be no question that the Republic would have had ample power and authority to have had that set aside, in whole or in part, as justice and equity might have demanded. But the land included within the defined boundaries had been appropriated by the grant and issuance of the title, and it may be regarded as extremely doubtful whether the State of Texas succeeded to any right to call in question any grants of land made by the Republic, under the due forms of law.

It has not been the practice of our courts to look behind the protocol and testimonio issued by the Mexican government, if in form complying with the law, to ascertain whether the grantee was entitled to lands, or whether he had received more than he was entitled to; on the contrary, where the protocol and testimonio have been executed in full compliance with the existing laws, and definitely describing the land granted by known and fixed boundaries, the courts have never disturbed those boundaries, though they usually contain a large excess over the quantity called for in the title. The Republic, by its legal and recognized agent, executed to M. B. Menard title to a certain tract of land, by known and definite boundaries; and in 1840 these boundaries and the entire grant was clearly recognized by the legislative authority, in the act of incorporating the city of Galveston.

In 1837 an act was passed requiring the Secretary of the Treasury to cause the island of Galveston, except the league and labor sold to M. B. Menard and his asso-

ciates, to be surveyed off into lots. That survey was made before the title to Menard was executed, and his title was made to conform with that survey. The appellee then had a grant from the Congress of the Republic, which was duly surveyed off by a government surveyor, and a title was issued by the President and Commissioner of the Land Office of the Republic, and this title and the boundaries of the land conveyed were clearly recognized by the subsequent legislation of Congress. And we think the Republic of Texas, by these acts, would have been estopped from denying the title of appellee to the full extent of the boundaries set out in its title.

It is, however, denied that a survey was made, and is claimed, that upon the demurrer, this denial must be taken as true; but we think a simple denial of a fact cannot put in issue the public laws of the country, or facts of historical notoriety, nor the evidence admitted by the pleadings. The acts of the Congress of 1837, ordering the survey of the island, and the fact that the island was surveyed in compliance with the act, are not denied by the pleadings, but are quite clearly established by the laws of the Republic and the judicial history of the country. (Pasch. Dig., 4249; The State v. Delesdenier, 7 Texas, 102.) And it might require something more than a simple denial to require proof of either, while the patent or quit-claim deed made a part of plaintiff's petition calls for the survey made by order of the government as a part of the boundaries of the land conveyed.

The Republic of Texas had conveyed all its title to appellee, and when it surrendered its sovereignty to the United States, and became an integral part of that government, it was stipulated by the articles of annexation that the State should succeed the Republic as owner of "all the vacant unappropriated lands lying within its

limits." The land described in the title exhibited by the pleadings in this case had been appropriated as had been hundreds of other tracts in a similar way, and it would not now be equitable or just to set aside any or all of those grants whenever and wherever they were found to contain an excess of land called for.

But the Legislature of the State passed an act in 1852 clearly recognizing all the rights conveyed under the grant to M. B. Menard in 1838, having especial reference to the title issued, and the land included therein. Again, in 1871 an act was passed granting a charter to the city of Galveston, which is declared to be a public act, and in which the boundaries of the Menard grant are clearly recognized and in effect confirmed. And now, after a clear recognition by the government of the grant to the extent of its boundaries claimed, for over thirty years, during which time important interests have grown up, and in which innocent purchasers have become involved, perhaps upon the faith of those repeated recognitions by the government, it is too late a day to claim a cancellation of the patent, because it may contain an excess of land called for.

But it is claimed that the patent was obtained through fraud, and is therefore null and void, and that the State is not bound thereby, notwithstanding the alleged fraud, if any, might and should have been known to the government for more than thirty years. But we think the allegations of fraud are too indefinitely made to require an answer by defendant below; and the demurrer admits only such allegations of the petition as are well pleaded. In the first place the petition fails to allege, with sufficient definiteness, any fraudulent acts or representations which did, or could, affect the validity of the patent. It alleges in substance that the metes and bounds described in said patent were made up, without any data, from actual sur-

vey; that the whole work of making out the metes and bounds was done at a great distance from the land; that the patent containing said metes and bounds was presented to the President as correct for his signature, and that the parties who made out the metes and bounds, descriptive of the land, well knew and intended that the same did and should embrace very many more acres than a league and labor. But there is no direct and specific allegation that they intended to cheat, deceive or defraud, and there is no allegation that the President who executed the deed, or any one else, was either cheated, deceived or defrauded. Story's Equity Jurisprudence, 204, says, that in order to constitute a fraud "the party must be misled by the misrepresentation, for if he knew it to be false when made it cannot be said to influence his conduct, and it is his own indiscretion, and not any fraud or surprise of which he has any right to complain." And again, the same author says: "The party must have been misled to his prejudice or injury."

The intent to mislead and defraud, and the fact that the party was misled and defrauded, are necessary allegations in a petition, in order to constitute a sufficient charge of fraud, and without them a petition would be demurrable. But it is alleged, perhaps as a badge of fraud, that there was no actual survey of the land attempted to be conveyed, and no return of any field notes to the Land Office, as required by law, and without which no patent could have legally issued. At the time of the issuance of the patent to Menard the land law of the Republic had not gone into operation. It is true that it had passed the Congress a short time before, but, if in force at that time, was not then generally understood by the people, and but few if any surveyors had been appointed to make surveys or return field notes; it is therefore reasonable to presume that no surveyor had been ap-

pointed under the general law for the island of Galveston, and it would now appear exceedingly hard at this late day that appellee should lose its title for not complying with a law that could not then have been executed. But this was a special grant made by an act of the Congress definitely pointing out its location, and prescribing no other act for the grantee but the payment of the purchase money, and making it imperative upon the President to execute a title upon the payment of the required sum, and a survey by a private individual, so as to obtain the exact boundaries, would have been all-sufficient for the foundation of a valid patent. But the Congress, by the act of 1837, provided for the survey of the whole island, excepting the Menard grant, into small tracts, and it is difficult to understand how the whole balance of the island could be run off into small tracts without ascertaining the exact boundaries of the tract excepted from the general survey.

We think the laws of the Republic, the repeated decisions of this court, and the general history of the country relating to that island, which may be judicially known to the courts, together with the admissions in the petition and exhibits in this case, establish beyond controversy the fact that the island of Galveston, including the Menard grant, was surveyed before the issuance of the patent in 1838, and that the boundaries of that grant, at least in part, were those established by that survey. The patent conveyed no inchoate right liable to be recalled or defeated at the pleasure of the government, but an absolute and indefeasible title, so far as the Republic was concerned, and the State succeeded to no authority or right to disaffirm or annul the solemn deed or grant of its predecessor. The District Court did not err in sustaining the demurrer to the petition, and the judgment is affirmed.

AFFIRMED.

A. GROESBECK V. ROBERT C. CAMPBELL.

It is error to take judgment against a remote endorser after dismissing as to the maker of a note. Such error should be corrected by appeal or writ of error, not by injunction or bill for new trial.

APPEAL from Austin. Tried below before the Hon. L. Lindsay.

To the Spring Term of the District Court, 1866, R. C. Campbell brought suit against Mrs. M. J. Hannay, maker, and R. B. Hannay and A. Groesbeck, endorsers of a promissory note, of date twenty-eighth of January, 1861.

The defendant, Mrs. M. J. Hannay, pleaded failure of consideration.

On June 13, 1866, a jury was waived and judgment rendered (plaintiff having dismissed as to R. B. Hannay) "that the defendant, M. J. Hannay, be released from all liability on said note and on account of failure of title to the land for which said note was given; * * * that the plaintiff have and recover of the defendant, A. Groesbeck, the sum of eleven hundred and fifty-nine dollars" and costs, etc.

On the judgment executions issued, and on the fourteenth of May, 1868, A. Groesbeck, who is plaintiff in error, obtained a temporary injunction, setting out in his petition carefully a history of the former suit.

The defendant in error, Campbell, filed motions to dissolve for various reasons—want of equity, failure to present defense in original suit, limitation of one year from date of judgment, etc.

Judgment dissolving the injunction and dismissing the bill. From this judgment this writ of error is prosecuted.

Ben. T. Harris, attorney for plaintiff in error, cited 17

Texas, 691, McFarland v. Hall; 31 Texas, 5, Took v. Taylor; 14 Howard, 334, Harris v. Hardeman; 31 Texas, 337, Emerson v. Navarro; 4 Wend., 292, Moore v. Hitchcock.

Hunt & Holland, for defendant in error, cited 1 Texas, 27, Larson v. Moore; 24 Texas, 526, Seguin v. Maverick; 26 Texas, 317, Lewis v. San Antonio.

WALKER, J.—A judgment against a remote endorser after dismissal as to the maker of the note, was erroneous; but this is not a proper case for injunction after more than one year had elapsed from the date of judgment. (Art. 3931, P. D.) Nor was a bill of review the proper remedy. The case should have been brought up on error. (Art. 1489, P. D.; Larson v. Moore, 1 Texas, 27; Seguin v. Maverick, 24 Texas; Lewis v. San Antonio, 26 Texas, 317.)

There is no prayer in the petition for a new trial on the merits. Error of law is all that is complained of.

The judgment of the District Court is affirmed.

AFFIRMED.

ALEXANDER SESSUMS ET AL. v. JOHN R. HENRY ET AL.

1. Where a person acting in the capacity of agent or partner, with full authority from his principal or copartners, in the purchase of property, gives a note or other obligation for the purchase money in his own name, and the property is received for the benefit of all, all will be equally bound as makers of the obligation.
2. Where the petition alleges that the defendant executed through his agent the instrument sued on, though the name of the defendant be not signed thereto, the burden of proof is upon the defendant to show that he did not sign it, or authorize it to be executed, in the absence of a plea of *non est factum* under oath.

Statement of the case.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

Suit was brought by appellees against Brooks, who is charged with having held himself out to them as the principal in the purchase of cotton, and having signed the draft given in part payment of said purchase in his own name. A. Sessums & Co. were also sued as subsequently discovered principals, and charged with the execution of the draft by Brooks as their agent in the terms of the statute. To this defendants filed answer and amended answers, and plea of *non est factum* by Sessums & Co., not sworn to, and a plea of accord and satisfaction.

The plaintiff introduced the draft with protest attached, and then introduced A. Sessums, one of the firm of A. Sessums & Co., to prove the facts alleged in the petition, charging his firm with being the principals in the transaction, and that Brooks acted as their agent. That they were the principals, that Brooks was their agent, that Brooks's drafts on them were their drafts, that they were bound by them, and only failed to pay this draft because of their failure in business, was stated by Mr. Sessums on the witness stand.

The court below gave the following among other instructions to the jury, viz: "Unless the jury believe from the proof the defendant, S. H. Brooks, did not make the draft sued on in the purchase of cotton for A. Sessums & Co., and was not authorized by said A. Sessums & Co. to buy said cotton, and to draw the draft sued on in settlement for said cotton, the defendants, Sessums & Co., are equally bound on said draft with said Brooks, and the plaintiffs have equal right against all of the defendants herein on said drafts." Verdict and judgment for plaintiffs.

Argument for the appellant.

Mills & Tevis, for appellant.—The court will notice that Sessums & Co. are no parties to the draft, either as drawers, acceptors or endorsers, or as guarantors, nor were they alleged to be partners of Brooks; the burden of proof then was on appellees to show affirmatively all their allegations to be true, in order to hold Sessums & Co. It is true appellees charge in the petition that Sessums & Co., by and through Brooks, made and delivered the draft sued on. But we take it that the name of a defendant must in some way be signed to an obligation in order to relieve the plaintiff from the burden of showing by proof that the defendant sued is bound.

The first charge of the court assumed, because so charged in the petition, that Sessums & Co. had executed the draft, and this without proof. The charge threw the burden of proof on Sessums & Co. that they did not sign the draft, either by themselves or by Brooks for them. The judge below thought a plea of *non est factum* by Sessums & Co. was necessary to cast the burden on appellees.

Instruments are received as evidence without further proof against only those whose names appear thereto in some way, and the suit must be founded in whole or in part on such signed paper. The mere charge in the petition that the draft was signed by A., when in fact it was signed by B., does not make it evidence against A. without further proof of A.'s privity. (Pas. Dig., Art. 1413.) Nor is any affidavit of A. needed, for there is nothing on the face of the draft in the supposed case for A. to deny. Nor did Brooks sign the draft as agent of Sessums & Co., looking to the face of the draft.

In the case of Austin v. Towns (10 Texas, 30), whose note was declared on as having been made by an agent, the court held the agency must be denied under oath, but there the principal's name was signed by the agent for

the principal. So in Reid v. Reid, 11 Texas, 592. The instrument was signed "by agent"—the affidavit was held necessary; and in Prince v. Thompson, 21 Texas, 481, the court assumed that the instrument was signed by the defendant because his name appeared to the paper sued on.

But in the case in hand appellees declare against Sessums & Co. upon a written contract to which their names nowhere appear, except as non-accepting drawees of the bill; and we think a general denial merely was fully sufficient to put appellees upon the proof that Brooks did buy the cotton for Sessums & Co., that Brooks was their agent in drawing the bill, that he had the authority to buy the cotton and draw the bill, and this without the necessity of a sworn plea by Sessums & Co. (Compton v. Stage Company, 25 Texas Sup., 68-70.)

Robert G. Street, for appellees.—Compton v. The Stage Co., 25 Texas Sup., is the only case cited for the position assumed by appellants. We submit, with all deference and respect, that the case is ill-considered, and upon this point erroneously adjudged. It cannot but affect all who read it with surprise that so important a question of statutory pleading should have been so adjudged, without reference to the statute itself. We feel no assurance that the application of the statute was recognized by the court. If this case be the law, what becomes of the numerous partnership cases decided by this court on the same? (Persons v. Frost & Co., 25 Texas Sup., 129; Drew v. Harrison, 12 Texas, 279; Davis v. Marshall, 25 Texas, 372.)

Would the rule be different from that laid down in the cases cited if a copartnership was carried on in the name of one of the partners alone? Yet there is no auxiliary statute to help out the partnership cases—none whatever.

Or suppose business carried on by several parties as copartners under the firm name of Richard Roe. Where then is the line of demarkation? Briefly and candidly, the partnership cases must be overruled if Compton v. The Stage Co. is maintained, and to do this, new words must be inserted in the statute and the long established practice disregarded.

The act of drawing a bill by one authorized to do so, is itself acceptance. (McKinney v. Bradberry, Dallam, 444.)

OGDEN, J.—This suit was instituted against all the appellants upon a draft drawn by S. H. Brooks on Sessums & Co. in favor of J. R. Henry, one of the appellees. The petition alleges in substance, that though the draft was executed by Brooks in his individual capacity, yet that it was given in part payment for the purchase money of a certain lot of cotton which was purchased for and on account of all the defendants below. And it charges all as the makers of the draft sued on, and seeks to hold all liable as such makers. There can be no doubt that where one person, acting in the capacity of agent or partner, with full authority from his principal, or copartners, in the purchase of property, gives a note or other obligation for the purchase money, all persons whom he represents will be equally bound with himself, as makers thereof, though that obligation be executed by himself alone, and particularly where the property thus purchased is received by and for the benefit of all. The allegations of the petition charge A. Sessums & Co. as the makers of the draft sued on by their agent S. H. Brooks. The answers to these allegations are a general denial, and a special denial in the form of a plea of *non est factum*, but which was not sworn to, and a plea of accord and satisfaction. The cause was submitted to a jury under instructions from

the court, and a verdict and judgment were rendered for the plaintiffs.

It is contended for appellants that there is error in the charge of the court, wherein it assumes that Sessums & Co. executed the draft, and casts the burden of proof upon them to establish a negative. But it is believed that Article 1443, Paschal's Digest, fully authorized the assumption complained of, and the instructions given. That article provides, that "When a petition, answer or other pleading, shall be founded, in whole or in part, on an instrument or note in writing, charged to have been executed by the other party, or by his authority, and not alleged therein to be lost or destroyed, such instrument or note in writing shall be received as evidence, without the necessity of proving its execution, unless the party by whom, or by whose authority, such instrument or note in writing is charged to have been executed shall file his affidavit in writing, denying the execution thereof." Sessums & Co. are charged to have executed the draft by Brooks, acting under authority from them; and the statute declares that it shall be received as evidence of the execution and authority, unless the same be denied under oath. This was not done by appellants, and we think the court did not err in the assumption of these facts, until the contrary was proven. It is however claimed that this statute refers only to those instruments where the name of the party sought to be charged appears upon the face of the instrument. But a party who executes a written obligation may be held liable under it, as well if he signs it with a fictitious name as though he signs his own; and where he authorizes another to sign he may be held liable under whatever name his agent may see proper to use. But the statute seems to settle that question by including all instruments which a party may execute or may authorize. And certainly if Sessums

authorized Brooks to draw this draft, as he did, the statute must apply to it, the same as though signed by Sessums & Co., or by Brooks as their agent. We are aware that a different rule was announced in Compton v. Stage Co., 25 Texas Sup., 78; but we are unable to reconcile that case with our statute, and are therefore inclined to think that the learned judge who delivered that opinion had the common law rule instead of the statute in his mind when he wrote. We can see no good reason why the rule of the statute should not apply to all parties, whether their names appear on the face of the instrument sued on or not, since in the one case the plea of *non est factum* denies the execution, and in the other the authority for the execution of the instrument. And we think the law as enunciated in Austin v. Towns, 10 Texas, 3, and Reid v. Reid, 11 Texas, 592, and in Prince v. Thompson, 21 Texas, 481, clearly applicable to this case, so far as a denial of the authority of Brooks is concerned.

But appellees in this case might readily waive all their rights under the statute, and admit all that appellants claim, for their general or special denial, and take upon themselves the burden of proof; and yet their cause is thus far fully made out, for they prove the execution of the draft by Brooks, and the authority to draw by Sessums. They have thus far established by positive proof, by the defendants themselves, every material allegation in their petition, and therefore the instructions of the court could not have misled the jury in that respect, if the rulings upon the plea of *non est factum* were erroneous.

According to the testimony of Sessums, on the trial of this cause in the court below, S. H. Brooks, at the time of the execution of the draft sued on, was buying cotton in the interior of the State for the house of A. Sessums & Co.,

on commission, and was fully authorized to draw on that house to an unlimited extent for all such purchases; and the firm of A. Sessums & Co. was bound by its understanding with Brooks to pay all such drafts as he might draw. It is also proven beyond controversy by Sessums and Brooks that the draft sued on was drawn in pursuance of that understanding between Brooks and A. Sessums & Co., and was given for the purchase of cotton which was shipped directly to and received by them. And it is now claimed for appellees that though the draft was drawn by Brooks in his individual capacity, yet he was acting under and by virtue of the authority of his principals, and his acts were, in contemplation of law, their acts, and his obligations were theirs; consequently, A. Sessums & Co. executed the draft by their agent Brooks. The name by which a party enters into a contract is not, ordinarily, essential to make a good and binding obligation; neither is it always necessary that the names of all the parties in interest be subscribed to a contract or obligation in order to bind all. If, therefore, Brooks purchased cotton for the firm of A. Sessums & Co., under and by virtue of ample authority from them for that purpose, and in payment for the same executed the draft sued on, in compliance with that authority, then A. Sessums & Co. may be held liable for the payment of that draft, as the makers thereof, whether their names appear in the draft as drawers or drawees, or whether they appear there at all or not. The facts were all before the jury, and they found Brooks and Sessums & Co. liable on the draft as makers or drawers, and it is believed that the testimony in this respect fully authorized their finding.

Upon the plea of accord and satisfaction, the jury also found against the appellants. We are not so sure that their finding in this respect is as well supported by the testimony. The witness Brooks testified very positively

to a full and final settlement of all liabilities on the draft. And yet there is some doubt cast upon the facts as testified to by him. There appears to be something unexplained in connection with his returning the cotton back to Adams & Hearne, strangers to the original contract, instead of the real owner. They were, according to the testimony, both in Galveston, and the cotton might as well have been delivered to Henry, the owner, as to Adams, a stranger; and this proposed arrangement came from Brooks, who certainly ought to have had great interest in the delivery of the cotton to Henry, and the cancellation of his draft.

There was also testimony which tended strongly to discredit his statements on a very material point, in regard to the discharge of himself and others on the draft. But these were questions of fact about which the jury should be better judges. They have decided against the appellants, and though upon the question of satisfaction the record may present to our minds some doubts as to the correctness of the verdict, yet we would not feel justified in declaring their verdict contrary to the law and the facts as proven on the trial, and the judgment is affirmed.

AFFIRMED.

MARILLA PERKINS v. GEORGE BAKER.

1. The wife is liable to pay the value of materials used in the improvements beneficial to her separate property, the title to which is in a trustee, when, by the wife's consent, the trustee permits the husband, as his agent, to manage the property and contract debts in the trustee's name.
2. While equity protects the estates of married women from illegal and fraudulent encroachments, it will not, at the same time, suffer the holders of such estates to deny the payment of a just debt created solely for their benefit, and from which they derive substantial advantage.

Statement of the case.

APPEAL from Harris. Tried below before the Hon. James Masterson.

Suit brought to recover on a note alleged to have been executed for brick and other materials furnished in improving real estate in the city of Houston claimed as the separate property of appellant. The pleadings are quite voluminous, to which various exceptions were taken, which it is unnecessary, in view of the opinion, to notice in full. The appellee and plaintiff below averred, by amended petition, that James Hosmer Perkins, husband of appellant, had control, management and agency of the property by consent and for the benefit of appellant and one Mary Williams, under a fraudulent deed made to James Perkins; that he acted as the agent of the said James Perkins, who held for their joint benefit under a deed from J. E. Kerby, and for the benefit of appellant; that he controlled and improved said property with the knowledge and consent and for the benefit of appellant; that James Hosmer Perkins was wholly insolvent, and that he fraudulently caused the title to be made to and represented James Perkins to be the owner of the property, and contracted with plaintiff, on the faith of such ownership, in the name of said James, who was a non-resident of Texas, for the purpose of cheating and defrauding, etc., for the benefit of said appellant, his wife; that the material furnished was necessary and proper for the improvement of the property; that said James Perkins did not consider himself responsible for debts contracted by said James Hosmer for and on account of the property so conveyed by him, and did not intend by his power of attorney to said James Hosmer that he should contract debts binding on him personally—all of which was concealed from and unknown to plaintiff at the time. Appellant further charged that James Hosmer acted fraudulently in the name of James Perkins, but

really and in fact for the benefit of his wife, the appellant. Plaintiff further charged that James Hosmer Perkins was, at the time of contracting the debt, insolvent, and left no estate at the time of his death, but that appellant had received a sum of money equal to appellee's claim from her husband's estate, as the share by inheritance of said James H. Perkins as one of the children of said James Perkins.

The appellant and defendant, among other things, alleged that the property (which was improved by material furnished by appellee) was never in fact the property of James Perkins, but was the separate property of Mary Williams and herself, and stood in the name of the said James Perkins solely as a naked trustee; that he never claimed it as his own, but always recognized the rights of defendant and her sister, Mary Williams. She denied that she ever, either in person or by agent, contracted the debt to Baker.

It appears that subsequent to the date of appellee's claim James Perkins conveyed the property on which the material furnished was used to Mary Williams, which conveyance, the appellant claimed, was intended to vest the legal title for the benefit of Mary Williams and herself. The appellee, before the institution of this suit, probated his claim as a claim against the estate of James Perkins, deceased.

It further appeared in evidence that James H. Perkins bought at administrator's sale certain lands, part of the estate of Proctor B. Hosley; that he paid at least in part for these lands with the receipts of his wife, Marilla Perkins, and her sister, Mary Williams, as heirs of Hosley, for their distributive portions of that estate, and that the lots in Houston were purchased with the lands so acquired.

The court gave, among others, the following instruction, viz.:

"If you believe and are satisfied from the evidence that the consideration of the note in evidence was brick, sold and delivered by plaintiff to James H Perkins, as the agent and attorney in fact of James Perkins, for the purpose of building on the town lot or lots in Houston then standing in the name of said James Perkins; and if you find that at the time of sale and delivery of the brick (the consideration of the note), Baker had no notice of any equitable claim of said Mary Williams and Marilla Perkins in and to the lot or lots in Houston, but gave credit to James H. Perkins as the agent of James Perkins; and if you further find from the evidence that said brick (if you find brick was the consideration of the note in evidence) were used in building on said lot or lots, and that the same were benefited thereby, then, as between Baker and Mary Williams and defendant, Baker's rights are not to be affected by the state of the title as between them and James Perkins, but the deed to Mary Williams, if intended only to vest the legal title in her for herself and defendant, was subject to the rights of Baker. If, however, the credit was given to James H. Perkins individually, and not as agent of James Perkins, or if Baker knew of the state of the equities existing between James Perkins and Mary Williams and defendant, or if he, by the use of ordinary care and diligence, might have known of such equities, then find for defendant."

There was a verdict and judgment for plaintiff for $7094.86, from which defendant appealed.

Stewart & Barziza, for appellant.—The appellee, George Baker, was estopped from proceeding in the manner attempted against appellant after he had procured his claim to be probated against the estate of James Perkins.

Argument for the appellant.

When George Baker signed his name to the affidavit authenticating his claims against the estate of James Perkins, this constituted an estoppel by deed; and the probating of his claims in judgment constituted an estoppel by record. (See Herman on Estoppel, 107, 350; the Duchess of Kingston's case, 2 Smith's Leading Cases, and the American Notes, commencing at page 545; Canal Co. v. Hathaway, 8 Wendell, 483; Swenson v. Walker, 3 Texas, 98; Guess v. Lubbock, 5 Texas, 535; Thomas v. Greer, 6 Texas, 378; Page v. Arnin, 29 Texas, 70; Teal v. Sevier, 26 Texas, 516; Williams v. Chandler, 25 Texas, 4; Love v. Fox, 17 Texas, 319; Parker v. Campbell, 21 Texas, 763; Jackson v. Parkhurst, 9 Wendell, 209.)

That the probating of the claims against the estate of James Perkins was putting them in judgment, has been always held by our Supreme Court (Finley v. Caruthers, 9 Texas, 517; Neil v. Hodge, 5 Texas, 489); and that such judgment is conclusive, has also always been held by our Supreme Court. (Foster v. Wells, 4 Texas, 101; Weathered v. May, 4 Texas, 387; Love v. Barber, 17 Texas, 312.)

Whatever alleged claims George Baker might have had against Marilla Perkins are merged into the note and account sued on, because George Baker accepted the note of James Perkins and made out the account against the estate of James Perkins, and had them both put in judgment. (Herman on Estoppel, 30, 83, 189; 1 Story's Eq., § 160; Mumford v. McPherson, 1 Johns. Reports, *418; Parkhurst v. Van Cortlandt, 1 Johns. Ch. R., *282; Cro. Car., 415; Raym., 449; 2 Jones, 158; 1 Bur., 9; 5 Com. Dig., Tit. Plead., 2 G., 12; Stampers v. Johnson, 3 Texas, 6; Mason v. Eldred, 6 Wallace, 231, and authorities cited in the opinion of the court; 16 Cal. Rep., 381; Smith's Manual of Equity, 47.)

All the cases show that the intention of the wife to

charge her separate property must be clearly proved. (Cartwright v. Hollis, 5 Texas, 159; Hollis v. Francois, 5 Texas, 197; Magee v. White, 23 Texas, 137, and all the authorities there cited.) How could she intend to charge her separate property, when appellee says she did not own it at the time?

We beg to direct the attention of the court, that in all the cases where expressions occur about the right of a wife to bind her separate estate in equity, they relate to necessaries for the family of the wife, and one case for necessaries for her negroes; the court will further observe that the case of Cartwright v. Hollis, 5 Texas, and the other cases which speak of a wife binding her separate property in equity, are where the estate of the wife was created by means of trustees, and not by statute. There may be some reason to apply the English or equity rule in cases of estates created by means of trustees, but that reason does not hold good in cases created by statute. (See Stansbury v. Nichols, 30 Texas, 145.)

The court will further note the fact that in the cases referred to and cited in the two cases in 5 Texas, the only relief sought was to charge the rents and revenues of the separate estates; but in the case at bar it is attempted to sell the *corpus* of property, worth about $85,000, to pay a debt of about $6000; and yet this is said to be an appeal to equity!

The separate estate of Marilla Perkins cannot be held bound, unless it is alleged and proved that she herself contracted the debt, or some one did it for her who was authorized, and that it was for necessaries for herself or children, or separate property. None of this was alleged; on the other hand appellee admits, both in his pleadings and in his sworn affidavit to the claims, that he gave credit to James Perkins, in his individual capacity, and not as

agent for Marilla Perkins. (Haynes v. Stovall, 23 Texas, 627.)

It has been alleged and fully proved that the property mentioned was held by James Perkins only in trust, and this is what we wanted the court below to recognize and charge the jury upon.

The doctrine of resulting trusts is recognized and approved by the highest authorities in England and America.

It does not matter what are the recitals in the various deeds down to Marilla Perkins; if the truth is that James Perkins held the property in trust, then it cannot affect the right of the beneficiaries.

Parol evidence is always admissible to show that a deed, absolute on its face, was a trust or mortgage. (Hilliard on Real Prop., 291, 342; Millican v. Millican, 24 Texas, 426; Groom v. Rusk, 27 Texas, 234, and cases therein cited; Oberthier v. Stroud, 33 Texas, 524.) In this last case Justice Walker, delivering the opinion of the court, says: "A resulting trust is protected against the operation of the registration laws."

We beg leave to invite the attention of the court to the following authorities upon the subject of implied or resulting trust: 13 Texas, 188; 20 Texas, 393; 19 Texas, 110; 33 Texas, 524. On fraudulent conveyance: 1 Texas, 362; 5 Texas, 367. And the following are decisive of several of the questions presented in the brief: 60 Barbour, N. Y., 292; 37 Barbour, N. Y., 42; 29 Barbour, N. Y., 484; 28 Barbour, N. Y., 622; 32 New York Reports, 649; 24 New York Reports, 623; 10 Paige, 618; 8 Paige, 161; 3 Paige, 440.

Gray & Botts, for appellee.—1. The lands of Hosley's estate, when sold by the administrator in 1845 and purchased by James Hosmer Perkins, became, upon the face

of the record, community estate, and when used in the purchase, by him, in 1858, of the Houston House property in the name of his father, whatever trust there may have been was for the benefit of the community estate, and was not Marilla Perkins' separate estate, to be governed by the statute, as a married woman.

2. Parol evidence of such a secret trust is not sufficient nor competent against creditors who furnished materials to the party holding the title for the improvement of the property, in total ignorance of the pretended trust.

3. If such a trust could be so established, yet the beneficiary's property so improved would be liable for the value of materials bought by the trustee with the knowledge and consent of herself and husband. Indeed, that equity will not allow such a trust to be established so as to defeat the equal equity of a creditor of the trustee holding the legal title.

These propositions, in addition to that of fraud in the whole transaction, were those discussed in the court below. We now present another, necessarily arising on the record, to-wit:

4. The pretended deed from James Perkins, by James Hosmer Perkins, to Mary Williams, made in May, 1861, and recorded in September, 1861, after the civil war began, under power of attorney given in 1852, was null and void, because James Perkins was a citizen of New York or California, and James Hosmer Perkins and Mary Williams were both then citizens of Texas, and the power to act was revoked by the laws of war and the laws of the United States. Therefore we say that the title of James Perkins has never yet passed to Mary Williams or to Marilla Perkins from her, and that equity will not permit it to pass to them until the debts contracted for their benefit by the trustee shall have been paid. (See 1 Kent's Com., p. 67; Griswold v. Waddington, 16 Johnson, 458,

483; see also Billingery v. Branch & Sons, 8 Am. Law Reg., N. S., 334; The Ouachita Cotton Cases, 6 Wallace, 527; Coppell v. Hill, 7 Id., 554; McKee v. United States, 8 Id., 163; United States v. Grassmeyer, 9 Id., 72; Semmes v. Hartford Ins. Co., 13 Id., 158; and others in same court.) The case of the *Protector*, 12 Wall., 700, shows the dates at which the war is held to have commenced and ended.

WALKER, J.—Regarding this case in whatever light we may, we think it has been rightly determined in the District Court.

If the property in question be the separate property of Mrs. Marilla Perkins, there is still no question but that her husband, with her knowledge, caused the title to be made to James Perkins, her father-in-law, who held it in trust for her use; but James H. Perkins, her husband, was permitted to manage the estate, and contract debts in the name of the trustee. In this manner the debt for which this suit is prosecuted was contracted. Were it a debt from which the trust estate had derived no benefit, or if it were such a debt as the trustee would have been wholly unauthorized to contract without the direction of a court of chancery, we should then scrutinize the powers of the trustee, and examine the relations of the parties very closely; but the debt was contracted for building material, which went into the construction of valuable and permanent buildings, from which the appellant is deriving large rents and profits. Perhaps no use could have been made of the same amount of money which would have resulted more to her advantage.

If equity protects the estates of married women from illegal and fraudulent encroachments, it will not at the same time suffer the holders of such estates to deny the

payment of a just debt, created solely for their benefit, and from which they derive substantial advantages.

It is unnecessary for us to notice the pleadings in this case. It may be that the case, through ignorance of the facts, or from some other cause, may not have been presented to the court in an unexceptionable manner; but the case was fairly enough before the court to authorize its equitable and legal determination.

The charge as given by the court to the jury could not have misled them. The facts were simple, and there was no difficulty in applying the law to them.

The judgment of the District Court is affirmed.

AFFIRMED.

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J. M. LEWIS v. E. B. NICHOLS.
SUSAN M. LEWIS v. E. B. NICHOLS.
JOHN WOODSON v. E. B. NICHOLS.

1. No judgment can be rendered against the representative of the estate of a deceased person binding on the estate, unless the defendant be sued in his representative capacity.
2. Execution can never issue against the estate of a deceased person, except when the estate is withdrawn, by the will, from the jurisdiction of the probate court.
3. A provision in the will exempting the executor from giving bond will not of itself authorize the issuance of execution against the estate in his hands, under a judgment against the executor; it can only be authorized where the petition avers and the evidence shows that the estate is excluded from the jurisdiction of the probate court.
4. When an executor makes a valid compromise of a debt against the estate of his testator, by giving to the creditor property which belonged to the executor in his individual right, he is entitled to be subrogated to the rights of the creditor, and will be entitled to share the assets *pro rata*.

APPEAL from Montgomery.

A careful statement of each case will be found in the opinion.

Abercrombie & Banton and *N. H. Davis*, for the appellants.

Baker & Maxey, for the appellee.

WALKER, J.—These three cases are submitted together, and will be so considered by the court.

Gen. John M. Lewis died in the month of April, 1862, testate, leaving Susan M. Lewis his widow. It is claimed his will is what is termed an "independent will," requiring only to be probated, but not otherwise bringing his estate within the jurisdiction of the probate court. Mrs. Lewis was the executrix of the will, and qualified under it. The estate of Gen. Lewis was doubtless solvent at the time of his death, but consisting in part of slaves. Emancipation reduced the estate to insolvency. Besides an independent estate Gen. Lewis and his wife were the common owners of a considerable amount of property. Mrs. Lewis also owned a large amount of property in her own right.

E. B. Nichols & Co. and P. J. Willis & Bro. appear to have been the principal creditors. After the death of her husband Mrs. Lewis made payments (mostly in cotton) to Nichols & Co. amounting to about forty-six per cent. of their debt, principal and interest.

In July, 1862, at a time when she probably had a right to consider the estate of her husband as solvent, Mrs. Lewis executed her individual note to Willis & Bro. for nearly $13,000. In November, 1869 this debt to Willis & Bro. amounted to $23,039.79. This we gather from statements of counsel. Mrs. Lewis compromised, and paid it by a conveyance of lands belonging to her in her own right. The lands are known as the Martin league and the

Ware quarter of the Collard league. In this compromise six hundred acres were set apart to Mrs. Iantha A. Woodson, now the wife of Miller A. Woodson. Willis & Bro. had attached the lands.

Suit was brought by Nichols & Co., in February, 1868, against John M. Lewis as the administrator *de bonis non* of his father's estate, claiming a balance of near $11,000 on a due bill, dated July, 1861. This claim was presented and rejected by John M. Lewis as administrator. Subsequently the plaintiffs made Willis & Bro. and Susan M. Lewis defendants by a supplemental petition, averring that the Martin league, the Ware quarter and some other tracts of land, never were the property of Mrs. Lewis, but belonged to the community estate or to the individual estate of Gen. John M. Lewis, and that the same was subject to administration.

In a second supplemental petition, filed in August, 1870, the plaintiffs charged Mrs. Lewis and Willis & Bro. with fraud on their rights and those of other creditors, and sought to set aside the sale of the Martin league and the Ware quarter of the Collard league, on the ground that the land was not the separate property of Mrs. Lewis. To these pleadings of the plaintiffs John M. Lewis answered as the administrator; Willis & Bro. claimed the lands; Mrs. Lewis, as an individual, answered generally, and specially denied fraud. On the trial at the February term, 1871, the following verdict and judgment were had:

"We, the jury, find for plaintiffs, E. B. Nichols & Co., ten thousand three hundred and five dollars. We also find for the defendants, P. J. Willis & Bro., the Martin and Ware tracts of land claimed by them, and for Mrs. Woodson the six hundred acres claimed by her, and for Mrs. Lewis her homestead, two hundred acres.

(Signed) "J. C. MCGANGHEY, Foreman."

"And it appearing to the satisfaction of the court that

the defendant, Susan M., qualified as executrix of her husband, J. M. Lewis, under his will, as set forth in the plaintiffs' petition, and that she has never been removed from said trust, it is adjudged that the plaintiffs' claim for the amount as found by the jury be and the same is hereby established as a valid claim against the estate of the said testator, J. M. Lewis, and that plaintiffs have and will recover of and from the said Susan M. Lewis, as executrix without bond of the said J. M. Lewis, said sum of ten thousand three hundred and five dollars, with all costs in this behalf expended, except the costs of the said John M. Lewis, the said P. J. Willis & Bro., and the said Miller A. Woodson and wife, to be levied of the goods and chattels, lands and tenements, of the said J. M. Lewis, in the hands of the said Susan M. Lewis to be administered, for which let execution issue; and further, that the said J. M. Lewis go hence and recover of the plaintiffs all costs by him in this behalf expended. And the said court having, during the progress of the trial of this cause, ruled that the said defendants, P. J. Willis & Bro., should elect either to proceed as creditors under their claim, or to claim the said Martin and Ware tracts under the conveyance from the defendant, Susan M. Lewis, as her separate property, and the said Willis & Bro., after excepting to said rulings, elected to claim said last named tracts, under said conveyance, and then by leave of the court withdrew all other matters in their answers set up, without prejudice, whereupon said verdict of the jury and the pleadings and evidence in the cause, it is considered, adjudged and decreed by the court that the said Peter J. and Richard S. Willis, in their said firm name of P. J. Willis & Bro., have good right and title to the said Martin league of land, in said Montgomery county, less the Salem tract of 320 acres and the 200 acres homestead of defendant, Susan M.

Lewis, and the 600 acres conveyed by them in the said compromise to defendant, Mrs. Iantha A. Woodson, and to the said Ware quarter of a league of land on the Elijah Collard league, in Montgomery county, being two of the tracts of land described in the deeds referred to as recorded in the record, Book L., pages 137, 138, 139, 140 and 141, of Montgomery county.

"It is further decreed that the said Mrs. Iantha A. Woodson, the wife of defendant, Miller A. Woodson, in her separate right, is the owner and has good right and title to said 600 acres under the said deed to her from the said P. J. Willis & Bro., and that said defendant, Susan M. Lewis, has good right and title to her said two hundred acres homestead tract.

"It is further decreed by the court that titles to the said several tracts of land, as conveyed in said compromise deeds of date the thirtieth day of November, A. D. 1869, and mentioned in the plaintiffs' second supplemental petition, filed on the twenty-third day of August, A. D. 1870, and the answer thereto of said P. J. Willis & Bro., recorded in said record, Book L., as conveyed therein to the respective parties thereto, be forever quieted, and that said deeds recorded in said book do stand as valid and binding.

"It is considered, adjudged and decreed by the court, that the said defendants, Peter J. and Richard S. Willis, in their firm name of P. J. Willis & Bro., do have and recover of the said plaintiffs, E. B. Nichols and Julius Frederich, in their said firm name of E. B. Nichols & Co., all of their costs in this suit incurred and expended, for which an execution may issue. And that the said Miller A. Woodson and his wife, Iantha A. Woodson, in the right of said Iantha, do have and recover of the said plaintiff all of their costs in this suit incurred and expended, for which an execution may issue. And that the

said defendants, Willis & Bro., Miller A. Woodson and his wife Iantha, be and are each discharged and allowed by the court to go hence, without further delay in this court.

"And it is further considered and adjudged by the court that within as reasonable time after the adjournment of this term, that the clerk of this court do tax the costs as above decreed, and if not paid, to issue execution as prescribed by law."

This is the verdict and judgment in No. 1393, and neither are authorized by the process or pleadings. The suit was brought against John M. Lewis, as the representative of his father's estate. It was against Mrs. Lewis individually. If John M. Lewis was not the administrator *de bonis non* of his father's estate, then that estate was not represented in the suit, and no judgment could have been entered against it. But this judgment sets out that Susan M. Lewis qualified as the executrix of her husband's will, and without being cited in the case to defend for the estate, a judgment goes against the estate awarding execution. The verdict would imply that Mrs. Lewis had made a good title to Willis & Bro. for the land claimed by them; that Mrs. Woodson's right to the six hundred acre tract is affirmed by the jury, as well as "Mrs. Lewis's right to the two hundred acre homestead." So far as these parties were properly before the court the verdict and judgment may be right and proper, but the judgment against the estate of Gen. Lewis is erroneous and must be reversed.

In No. 1455 suit was instituted by Nichols & Co. against John M. Lewis as the administrator of his father's estate. By supplemental petition Susan M. Lewis and John M. Lewis, in their individual capacity, Iantha Woodson and her husband Miller A. Woodson, and P. J. and R. S. Willis, were made parties defendant.

The object of this suit was to subject certain lands claimed or owned by Mrs. Lewis in her own right to the payment of the debts of her husband's estate. In this case Mrs. Lewis was not sued as executrix, nor any judgments sought against her as such. The plaintiffs did not aver that she was the executrix of an independent will, but on the contrary they aver that the will does not exclude the jurisdiction of the probate court.

The verdict of the jury is as follows: "We, the jury, find for the plaintiffs, E. B. Nichols & Co., $10,305." On this verdict judgment was rendered against Mrs. Lewis as executrix, and execution awarded against the estate in her hands.

It is insisted that this judgment must stand on the presumptions which the law implies in its favor, without a statement of facts. The answer, however, to this is, that the verdict and judgment are not supported by the pleadings. (Pinchain v. Collard, 13 Texas, 335.)

The only case under our law where execution can run against the estate of a deceased person, is where the estate is withdrawn by the will from the jurisdiction of the probate court. (Art. 1371, Pas. Dig.) We do not think that exempting the executor from giving bond alone will authorize execution against the estate in his hands.

The plaintiff should have averred that the estate was excluded from the jurisdiction of the probate court, which they did not do, but did aver the contrary. In Gough v. Hosser, 33 Texas, 430, it was decided that in rendering a judgment against an executrix, it was error to award execution against the estate of the testator, when the petition did not aver the facts properly authorizing the same. But this judgment was entirely wrong, for the reason that Mrs. Lewis was not sued as the executrix of her husband's will. (Moore v. Gest, 8 Texas, 119.)

No. 1454 is an action of trespass to try title. The

appellant claims under a sale by John M. Lewis, administrator *de bonis non*, with the will annexed of Gen. John M. Lewis.

The appellant's title is from the sheriff who sold under the judgment in case 1455. And here the statement of facts shows that Mrs. Susan M. Lewis did qualify as the executrix of her husband's will, took charge of his estate, managed it, paying debts, and otherwise controlling it until 1867. The opinion of the court in No. 1455 determines that the appellee has no title to the land in question, and is decisive of the controversy in this case. It is, therefore, unnecessary to express an opinion upon any other question raised by the pleadings. We have, then, no other duty to perform in these cases than to lay down the principles on which the rights of the parties may hereafter be adjudicated. If Mrs. Lewis has not been removed from the trust, she is still the executrix of her husband's will, and must be so treated in all suits against the trust fund. If the estate is withdrawn by the will from the jurisdiction of the probate court, it may be so treated.

If Mrs. Lewis made a valid compromise of the debt of P. J. Willis & Bro. by giving them property which belonged to her in her own right, she is subrogated to their rights as a creditor, and will be entitled to share the assets *pro rata*. If by the compromise Mrs. Woodson obtained a title to the six hundred acres of land claimed by her, the land belonging to her mother, she wants no other title. These cases should be consolidated in the District Court, and by a proper amendment of pleadings and process the rights of all parties can be adjudicated.

The judgments are all reversed, and the cases Nos. 1455 and 1393 are remanded, and 1454 is dismissed.

REVERSED AND REMANDED.

JOHN BURLACHER v. FANNY WATSON.

In a suit involving title to personal property, the intervenor who is found to be the owner is, as against the plaintiff who had attached the property, and another intervenor who has it in possession, entitled to judgment for possession of the property, and to a judgment against the plaintiff in the alternative for its value under a prayer for general relief.

ERROR from Galveston. Tried below before the Hon. A. P. McCormick.

Suit originally brought by J. H. Brower & Co. against C. F. Jenny to recover a debt due the former. On the twenty-third of January, 1869, plaintiff sued out a writ of attachment, which was levied on the property in controversy. Afterwards plaintiff in error, John Burlacher, intervened and claimed that Jenny was indebted to him in the sum of $1575, to secure the payment of which he had a lien on the property attached. On the seventeenth of December, 1869, Fanny Watson also intervened, claiming the property as her own at the time of the levy; that the same had been illegally and wrongfully attached; that the property was worth $2000, and prayed judgment for the property both against J. H. Brower & Co. and C. F. Jenny, and that the same be decreed to be delivered up to her, and in case the same cannot be had, for judgment against J. H. Brower & Co. for $2000, its value. No judgment was asked against Burlacher aside from the prayer for general relief.

The jury returned the following verdict, viz.:

"We, the jury, find for the intervenor, Fanny Watson, the property mentioned in her bill of intervention, and assess the value thereof at fifteen hundred dollars."

The judgment provided, "That the sheriff and the plaintiff deliver up to said Fanny Watson the said property herein adjudged to her in satisfaction of her judg-

ment herein; and it is further adjudged and decreed, that the intervenor Fanny Watson do have and recover of and from the said plaintiff the sum of fifteen hundred dollars, the value of the property herein adjudged to her, the said Fanny Watson, for which execution may issue, and may be discharged by the plaintiff delivering up said property to said Fanny Watson in full satisfaction of her judgment herein."

Burroughs & Allen, for plaintiff in error.

Spencer & Stewart, for defendant in error.

WALKER, J.—This is somewhat a novel case. We are not asked to reverse, but to reform the judgment. We do not think it needs any reformation.

John Burlacher, the appellant, was an intervenor in the case, as well as Fanny Watson, the appellee. He averred in his pleading that he was in possession of the property claimed by the appellee.

The jury found the property belonged to her; and under a prayer for general relief the judgment against him, to surrender the property or pay for it, was right and proper, and it is therefore affirmed.

AFFIRMED.

GEORGE W. HONEY v. E. J. DAVIS ET ALS.

1. Pending an appeal involving the right to the office of State Treasurer, where neither party is in full possession of the office, safes and public money, that party in whose favor the judgment of the District Court has been pronounced must be regarded as *pro tempore* the Treasurer of the State.
2. When both parties are before the Supreme Court on return to *scire facias* sued out by one of the parties against the other, on a charge of contempt, this court has power to make such order as may be necessary to place the Treasurer *pro tempore* in full possession of the office.

Statement of the case.

George W. Honey, on the eighteenth day of July, 1872, filed in this court his petition, under oath, against B. Graham, E. J. Davis *et als.*, praying for a *scire facias* to the parties named, commanding them to appear and show cause why they should not be held in contempt of this court. Petitioner alleged that on the sixth of July, 1872, a judgment was rendered in the District Court of Travis county, in a proceeding in which G. W. Honey was plaintiff, and E. J. Davis *et als.* were defendants, which was made a part of his petition. That judgment, among other things, declared, "that the plaintiff, George W. Honey, is not the Treasurer of the State of Texas; but, on the contrary, that on the twenty-seventh day of May, A. D. 1872, the defendant, B. Graham, became, has since continued to be, and is, the Treasurer of the State of Texas." The judgment provided, "that in case the said plaintiff shall take a *non-suspensive* appeal, and shall first deliver to said B. Graham all the keys, together with all the secrets of the combinations of the locks of the safes and vaults of the Treasury of the State of Texas, which are the property of said State, and should rightfully be in the exclusive possession and control of said B. Graham, as the Treasurer thereof; that upon its being proven by said B. Graham, to the satisfaction of the clerk of this court, that said plaintiff has so done, he shall be permitted to take and perfect a *non-suspensive* appeal, upon his executing a bond with securities, to be approved by said clerk, in double the amount of the costs, etc. But if said plaintiff shall desire to take a suspensive appeal, and without delivering up said keys, etc., then and in that event the bond to be given by him is fixed in double the amount of the funds in gold and in United States legal tender notes of the State, proved by the commissioner in this cause to be in the Treasury; and double the amount of the two checks of E. Bremond, to-

gether with double the value of the keys, safes, vaults and combinations aforesaid, to be ascertained on proof, to the satisfaction of the clerk; and in case he fail to execute said bond, he be not allowed a suspensive appeal," etc.

The petition alleged that within twenty days after the judgment was rendered, Honey, on the seventeenth of July, 1872, filed with the clerk a suspensive appeal bond in the sum of $450,000, the amount fixed by the clerk, and which was approved. That he has perfected his appeal, and has used due diligence to have the transcript prepared. That said suit was brought to recover possession of the office of Treasurer, and of the safes, vaults, etc., pertaining to the office, which he alleged had been illegally seized by E. J. Davis, Governor of Texas, and by him held by military force. That petitioner claimed said office by election of the people, and B. Graham by appointment from the Governor. That since executing his appeal bond the said Graham and others, acting under authority of E. J. Davis, Governor, have gone into the Treasury building, seized the property belonging to the Treasury, and were attempting by force to open the vaults and safes. That if the books, and papers, and money, belonging to the Treasury, are seized and held by the respondents, it will be impossible for plaintiff to make settlement with the Comptroller, as required by law; and that B. Graham, E. J. Davis *et als.* are, by reason of the acts charged, in contempt of the jurisdiction of the Supreme Court; wherefore he applied for *scire facias*, etc.

On the nineteenth of July, 1872, the respondents answered, alleging the appointment of B. Graham and his commission as Treasurer of Texas on the twenty-seventh day of May, 1872; that he had taken the oath and executed the official bond required by law; that at the date of his appointment that office was vacant by the volun-

tary abandonment of it by the plaintiff; that prior to that time the plaintiff vacated the office of State Treasurer and left the State of Texas, without permission from the Legislature or the head of the executive department. That respondent Graham has been in actual possession of the State Treasury building, with its rooms, furniture, safes and vaults, since the twenty-seventh day of May, 1872. That since the judgment of the District Court declaring respondent Graham Treasurer, Honey, on the tenth day of July, 1872, executed a non-suspensive appeal bond in double the amount of costs incurred in said proceeding; that respondent afterwards applied to said Honey, under the authority of said judgment, to deliver to him the keys, together with the secrets of the combinations of the locks to the Treasury vaults and safes, which he refused to deliver.

That on the fifteenth day of July, 1872, respondent, though in possession of the office of State Treasurer, with the safes and vaults of the office, being unable to obtain access to the public funds, applied for and obtained from the Judge of the Twenty-seventh Judicial District a mandatory injunction, commanding, enjoining and restraining the said Honey from longer withholding, from the possession of respondent Graham, any of the keys to the safes and vaults of the Treasury of Texas, and from longer withholding from the knowledge of respondent the secrets of the combinations of the locks to the said safes and vaults.

The fiat of the judge required the sheriff of Travis county to make prompt return in writing, filed with the clerk, on the day of service of said writ concerning the action of said Honey, in obedience to or disregard of said writ, and concluded as follows, viz: "Should said Honey refuse or fail to obey promptly the above mandate, or should he not be found, that notice of the same may be

served on him, then the petitioner (who is hereby recognized as custodian of the Treasury of the State of Texas, and charged with performing the duties of State Treasurer, pending litigation for the office) shall take such steps, and use such means, as may be necessary to obtain access to the interior of the safes and vaults of the Treasury of the State of Texas, even to the destruction of the locks and secrets of the combinations of the same, should it be necessary. To accomplish which, if needed, he will call on the Governor of Texas for assistance."

Respondent Graham admitted that he had attempted to break the locks of the safes and vaults, to the end that the public business might be resumed; but averred that the same was done in pursuance of the order of the district judge, which Honey had refused to obey. Respondent filed with his answer a motion asking for such order from the Supreme Court as would compel Honey to comply with the fiat of the district judge.

Hancock & West, *Green & Walton*, and *Chandler*, *Carleton & Robertson*, for plaintiff.

No briefs on file for plaintiff.

Wm. Alexander, *Attorney-General*, for respondent.

A. W. Terrell, also for respondent.—This case reveals the fact that the plaintiff has for nearly three months suspended the financial affairs of the State by his refusal to deliver to the Treasurer *de facto* the keys and secrets of the combinations of the locks to the safes and vaults of the Treasury. To stop this evil the mandatory injunction was issued, which enjoined him from longer withholding from the possession of the respondent, Graham, the keys to the locks of the safes and vaults, and from longer withholding from the knowledge of Graham the secrets of the

combinations of said locks. To obey the order affimative action was required, viz., to deliver the keys and communicate the lock combinations. The district judge had power to make the order. (Hilliard on Injunctions, p. 7; Maxborough v. Bower, 7 Beav., 127.)

Injunctions are known as mandatory or preventive according as they command defendant to do or refrain from doing a particular thing. The power of a court of equity to issue a mandatory injunction, though once doubted, is no longer questioned. (High on Injunction, p. 3, edition of 1873; Hilliard on Injunction, p. 7; Garretson v. Cole, 1 Har. & J., 370; Robinson v. Byson, 1 Bro. C. C., 588; Hevery v. Smith, 1 Kay & J., 392; Martyr v. Lawrence, 2 De Gex, J. & S., 261.) And they may be granted on interlocutory applications. (Robinson v. Byson, 1 Bro. C. C., 588; Hervey v. Smith, 1 Kay & J., 392.)

Mr. High, in his work on Injunctions, p. 3, says: "It is to be observed, however, that courts of equity rarely interfere to compel the doing of a positive act, but the same result is obtained by framing the injunction in an indirect form and prohibiting the defendant from doing the reverse of what he is desired to do." (See Lane v. Newdigate, 10 Ves., 192; Maxborough v. Bower, 7 Beav., 127.)

Honey elected on the tenth day of July to prosecute a non-suspensive appeal in the case, involving the right to the office, and gave his appeal bond covering the costs only. On the thirteenth of July the injunction issued, and three days afterwards he attempted, in open contempt of the District Court, to evade its mandate by executing a larger bond which might operate as a *supersedeas*. Since he has invoked the power of this court to punish for contempt regarding a matter concerning which he himself has been acting in defiance of the order of the district judge, we ask that this court will compel an ob-

servance of that order. The Treasury of a State cannot be closed because two of its citizens dispute about who shall be its custodian. The respondent Graham being recognized by the Executive, and adjudged by the District Court to be Treasurer, and being in actual possession of the office, must be regarded as Treasurer for the present, whatever may be the result of the litigation involving the right to the office.

Sheeks & Sneed, also for respondent.

EVANS, C. J.—The petition represents that on the sixth of July, 1872, judgment was rendered in a certain cause pending at the time in said court, in which petitioner was the plaintiff, styled G. W. Honey v. E. J. Davis *et als.*

It is alleged that the suit was brought to recover the office of Treasurer, and the safes, vaults, books and papers pertaining to said office.

That judgment was rendered against him, and in favor of B. Graham, from which judgment he had taken a suspensive appeal, and given bond, etc.

It is further alleged that said safes, vaults, books, papers, etc., had been illegally seized by E. J. Davis, by military force.

On this petition a rule was entered against the parties named, to show cause why they should not be held in contempt of this court, to which rule the respondents answer substantially: That B. Graham is the Treasurer of the State; that as such Treasurer, it is his duty to administer the office, and discharge all the duties appertaining thereto; that there is no judgment, order or decree of any court suspending him from the functions of his said office; that as Treasurer he is entitled to the custody of the keys, together with all the secrets of the combinations of the locks, safes and vaults of the Treasury of the State;

and that he has been and is now obstructed in the proper discharge of his duties as Treasurer, to the irreparable injury to the public service, by reason whereof he prays not only to be dismissed, but for the peremptory order of this court on said petitioner Honey to deliver up to him as Treasurer the keys, and secrets of the combinations of the locks, safes and vaults of the Treasury, to the end that he may be enabled to discharge properly the duties of said office during the pendency of the appeal.

In this answer the respondent Graham refers to a motion heretofore made by himself and others against George W. Honey, asking for a peremptory process against Honey to deliver up the keys, and secrets of the combinations, etc., to the said Graham, etc.

On this motion we have not as yet been able to determine the question of jurisdiction, but the motion of the petitioner, Honey, against E. J. Davis *et al.*, brings the questions involved in both motions within our jurisdiction.

We now have before us, upon the records and by the facts declared and admitted by counsel, enough to enable us to grant such order as the rights of the parties and the grave interests to them personally and to the public belonging requires.

Disavowing any purpose to consider any of the questions raised by the appeal, in this opinion, we find the judgment of the District Court has declared B. Graham Treasurer of the State of Texas, and as such *pro tempore* and for the purposes of this decision we must regard him.

As the Treasurer of the State, no man can be permitted, upon any pretense whatever, to hinder him in the due discharge of his official duties; and, as such Treasurer, he is entitled to the custody of the keys, secrets of the combinations of the locks, safes and vaults of the Treasury;

and every such attempt to hinder or obstruct him in the due discharge of his official duties will be regarded by this court as an unauthorized interference with the due administration of the government, against which all courts of competent jurisdiction are bound to grant relief.

The relief now invoked we believe to be within our jurisdiction, and in the solemn discharge of our official duties we do order, adjudge and decree, that the rule, issued by this court against E. J. Davis and others, be dismissed, with costs to the respondents, and that George W. Honey do, by the hour of 5 P. M. this day, deliver to B. Graham, Treasurer *pro tem.* of the State of Texas, all the keys and secrets of the combinations of the locks of the safes and vaults of the Treasury, and that he no longer hinder or delay the said B. Graham from the due execution of the office of Treasurer of the State of Texas. That in default of due compliance with this order, the said B. Graham do proceed to open the vaults and safes of the office of the State Treasury by any available means within his power, having due regard to the preservation of the public property.

ORDERED ACCORDINGLY.

W. H. TUCKER v. E. D. STREETMAN.

1. In matters of contract the parties are presumed to have acted legally in making it until the contrary is shown.
2. The law presumes that the note expressed the intention of the parties, and the presumption will not be removed by proof of condition of the country in 1868, at its date, and the currency in general use.

APPEAL from Milam. Tried below before the Hon. J. M. Onins.

Suit on a promissory note executed by the appellant, W. H. Tucker, for $450.

Statement of the case.

The defense was that the note was executed upon the basis of Confederate money, and that by the express agreement of the parties it was to be discharged in such Confederate States bills.

The testimony was conflicting.

The court instructed the jury as follows:

"In the absence of proof of an express contract for Confederate money, the law presumes that the written instrument expresses the meaning of the parties, and that they meant dollars in par funds; and if you should believe from the testimony there was no express contract to receive Confederate money for the note, you will find for the plaintiff the amount of the note, and also whether the note is a lien upon the property described.

"The jury cannot imply a contract from surrounding circumstances. The proof must show an express contract made on the basis of Confederate money; and if there was not such express contract the plaintiff must recover. You are the exclusive judges of the weight of testimony and of the credibility of the witnesses, and you will determine the facts of the case accordingly as you may believe the truth has been stated by the one witness or the other.

"The relative number of witnesses testifying to facts when they conflict does not afford a certain rule for the determination of the truth. The testimony of one witness whom the jury believe should overweigh the testimony of two or more witnesses whom they doubt; but when all the witnesses are in the opinion of the jury equally credible, and testify uninfluenced by their interest, the weight of the testimony should be given to the greater number. The sole test, where there is a conflict in the testimony, is the credibility of the witnesses; and, in determining their credibility, the jury may consider the witnesses themselves, their interest in the result of the suit, and the man-

ner in which they testify, as well as to the fact that they have been contradicted or corroborated as to other facts by other witnesses."

Sayles & Bassetts and *C. R. Smith*, for appellant.

W. H. Hamman, for appellee.

OGDEN, J.—In the criminal law a party is presumed to be innocent until his guilt is established by proof. So, also, in the civil relations of life, and especially in matters of contract, a party is presumed to have acted legally until the contrary is proven. And when a party executed a note payable in dollars, the presumption is that he intended that note to be discharged only in lawful money; and no surrounding circumstances not connected with the contract evidenced by the note (such as the condition of the country, or the character of the currency then in general circulation), will rebut that presumption. The note sued on in this case was executed in 1863, and by its terms payable in dollars, and the defense set up to this acton is, that by agreement between the parties, the note was payable in Confederate money, and that therefore the consideration was illegal and the contract void.

The charge of the court, though possibly subject to criticism in its phraseology, yet in our opinion, as a whole, presented the law which should govern the facts of the case. The charge instructed the jury, in effect, that if there was an express contract that the note was to be paid in Confederate money, the contract is void; but, in the absence of proof of an express contract for Confederate money, the law presumes that the written instrument expresses the meaning of the parties; that the jury cannot imply an illegal contract from surrounding circumstances; and that the plaintiff must recover unless the proof shows that there was an express contract on the

basis of Confederate money. We think this the law of the particular questions then under consideration, about which the jury could hardly be mistaken.

The charge of the court in regard to conflicting and contradictory testimony is in the main correct. It says: "The sole test, where there is a conflict in the testimony, is the credibility of the witnesses; and in determining their credibility the jury may consider the witnesses themselves, their interest in the result of the suit and the manner in which they testify, as well as the fact that they have been contradicted or corroborated as to other facts by other witnesses." Though not as full as it might have been, yet we see no such error in the charge as would vitiate the verdict of the jury. Certainly if a witness is contradicted or corroborated in any material portion of his testimony by another witness, that fact may and should be considered by the jury in determining his credibility. And this is the only instruction which can be drawn from the latter portion of the charge given. We think the legal question arising in this case very fairly presented to the jury. The testimony was conflicting and contradictory, and it was the peculiar province of the jury to determine the credit to be given to the statements of such witnesses, and to sift the truth from error. There was evidence, if true, sufficient to warrant the verdict, and we are disinclined to disturb their finding. The judgment is therefore affirmed.

AFFIRMED.

Argument for the appellant.

GEORGE B. LYLES v. DANIEL MURPHY.

1. A tenant in undisturbed possession cannot set up title in himself as against the title of his landlord under which he entered.
2. Suit for possession of realty may be joined with a claim for rent of the property.
3. A tenant in possession who purchases a superior outstanding title before eviction or surrender of his lease, cannot resist the payment of rent to the landlord for the term.

APPEAL from El Paso. Tried below before the Hon. S. B. Newcomb.

Suit brought by the appellant, which, after several amendments of petition, was an action for the possession of real property leased by appellant to appellee, and for rent due according to the terms of the lease. The defendant and appellee, among other things, set up title in himself to the premises leased; charged that plaintiff had no title except such as he derived by purchase from one Hubbell; that he, defendant, owned the land before and at the time the location was made thereon by Hubbell, and that the patent which issued to Hubbell was obtained by fraud.

It was in evidence that appellant was in possession when the lease was made; that the appellee entered under his lease, agreeing to pay rent; that the lease had terminated, and that appellee refused to pay the rent. To this evidence the appellee demurred by demurrer, which seems to have been filed after verdict for appellant for $2050 and for possession of the premises. The court sustained the demurrer to the evidence, set aside the verdict, and rendered judgment for appellee for costs.

Hancock & West, for appellant.—Our judicial system favors the joinder of actions whenever it can be done without injury to the parties, that all matters may if pos-

sible be adjusted in one action, thereby saving the parties the costs, expenses and annoyances of multifarious suits. And it is usual, in our State, to join these two causes of action; but they still remain distinct, for the tenant may show that he owes no rent, while the landlord may recover possession of the premises, or *vice versa.* (Sayles' Practice, § 470.)

It being well settled that a tenant cannot dispute his landlord's title as long as he holds under him, nor set up title in himself until his possession becomes adverse to his landlord, either constructively or actually, it follows as a matter of course that a tenant, before he can acquire any title to premises upon which he has entered under a landlord, must hold them adversely by naked possession for the length of time required by the statute of limitations. He cannot set up any title which he may have had in himself at the time of the demise, but must rely upon actual naked possession alone. And the failure to pay rent is not of itself such a breach or forfeiture of a lease as to make the possession adverse.

The lease under which the appellee holds the premises being a mere parol lease from month to month, the appellant can only recover so much of the rent due as was not barred when this action was instituted. This amount was found by the jury to be $2050, and they also further found that the appellant was entitled to the possession of the premises. This sum of $2050 is all that the appellant can recover on this branch of the case, and all that he asks. On the other branch of the case the appellant has shown (and it is admitted by the appellee) that he was in possession of the premises, that the appellee entered upon them under a lease from the appellant, that the lease has terminated, and that he has demanded possession from the appellee, who refuses to yield it up.

There cannot be a shadow of a doubt of the right of

the appellant to recover the possession of the *locus in quo*, and the rent found to be due by the jury; and we respectfully submit that this court should reverse the judgment of the District Court and proceed to render the judgment which the court below should have rendered on the finding of the jury and the facts proved and admitted, in favor of the appellant for the rent due as ascertained by the jury, and for the possession of the premises.

Walton & Green, for appellee.—The proposition that a tenant cannot dispute the title of his landlord, nor set up title in himself, as a general rule is not denied, but is not without at least one exception, under which the present case seems to fall. (Adams on Ejectment, pp. 276, 277; 5 Cowen R., 135; 5 Conn. R., 291; Comly v. Stanfield, 10 Texas R., 546.)

The defendant, Murphy, sets up in this pleading that the title, apparently good in Hubbell at the date of his entry, was subsequently, on account of having been fraudulently obtained, annulled and canceled, and the property reverted to the State. That this was a fact is admitted by the demurrer of plaintiff.

There can then be no doubt that the title under which appellee entered having expired, or been destroyed before the commencement of the action, he could show title in another just as he could if appellant had sold the land, or it had been sold under execution. (5 Conn., 291; 5 Cowen, 135; Tillinghast's Adams on Eject., p. 276.)

The title having been divested out of Hubbell, and revested in the State, the possession and right of possession returned to the State; for it is not believed that an individual can acquire legal possession against the State. "A tenant may show that his landlord holds in violation of the laws of the State, or that his interest has since ex-

pired, as that he has sold and conveyed the land, and that therefore he has no right to bring the suit." (Taylor's Landlord and Tenant, §§ 629, 707.)

We therefore maintain that the demurrer was rightly sustained by the court below.

1. Because the appellant proved no title in himself, which he was bound to do under the form of action adopted by him.

2. Because if he could be permitted to recover on his possession, it was admitted that the title under which he held, and under which appellee entered, had been destroyed before the commencement of his action.

3. Because the question of possession *vel. non* was not submitted to the jury at the trial.

WALKER, J.—It is somewhat difficult to determine the precise nature of this action. The plaintiff brought his suit to recover the possession of real property, and for rent due; and in his original petition tendered an issue of title, but amended his pleading, counting only upon his own possession at the time of the making of the lease to the defendant, the defendant's entry under the lease, his forfeiture of the lease by refusal to pay rent, and his refusal to surrender. The defendant sets up title in himself. The rule of law is well settled that a tenant in possession cannot dispute his landlord's title. He must be ousted of his possession, or so disturbed in it as to make it necessary to give his landlord notice to defend the title, or he will not be permitted to set up title in himself; nor will he be permitted to defraud his landlord of his title.

The defendant in his pleadings sets up different matters in avoidance, and finally demurred to the plaintiff's evidence. The appellant joined in the demurrer. The court, sustaining the demurrer, gave judgment for the appellee, which, we think, was error. Had this been the ordinary

action of trespass to try title, it may be that the appellee could show a better title to the premises than the appellant; but in the opinion of this court, for anything disclosed by the record, he has not acquired it in such a way as to avoid the payment of rent. There is nothing to show that he was ever evicted from the premises or surrendered his lease. There can be no controversy about the facts in the case; the demurrer admits their truth, but denies their competency, and it was only necessary for the plaintiff below to prove his own possession, the entry of the defendant, and the expiration or forfeiture of the term.

Some objection is made to this suit on the ground of misjoinder of causes of action. At common law this objection would be good, but under our system we think the objection cannot be maintained. We have no distinction here between the action of ejectment—if, indeed, that action remains to us—and the action of debt; nor have we drawn a distinct line between personal and real actions. Undoubtedly several actions may have grown out of the transaction between these parties. The plaintiff might have sued the defendant for each month's rent as it fell due, or he might have brought an action for forcible detainer to recover possession, and another for the rent due. But our laws and the decisions of our courts favor the joinder of all causes of action arising between the same parties in the same right and growing out of the same transaction.

For the reasons given, the judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

JACKSON BURCH V. CORPORATION OF BASTROP.

1. Where an appeal bond fails to show for what the judgment was rendered in the court below, the appeal will be dismissed for want of jurisdiction.
2. No appeal lies to the Supreme Court from a judgment rendered in the District Court in a case which had been appealed from the court of a mayor or justice of the peace.

APPEAL from Bastrop. Tried below before the Hon. J. P. Richardson.

This was a criminal prosecution instituted in the court of the Mayor of Bastrop for a violation of an ordinance of that town. Burch was fined in the Mayor's court $75, and appealed to the District Court. On motion the appeal was dismissed for want of sufficient bond. To this action an exception was taken and an appeal attempted to this court. The appeal bond last given failed to describe the character of judgment rendered in the District Court.

Jones & Sayers, for appellant.

Fowler & Wilkes, for appellee.

OGDEN, J. The appeal in this case must be dismissed for the want of jurisdiction in this court. First—Because the appeal bond is insufficient to give this court jurisdiction, as it wholly fails to describe the judgment of the District Court, from which the appeal is attempted. Second—This is an action which originated in the Mayor's court of the city of Bastrop, and was appealed to the District Court; and Section 12 of the act of August 13, 1870, giving appeals from justices' and mayors' courts, provides that in appeals to the District Court the case shall be tried *de novo*, and such trial shall be final, without an appeal to the Supreme Court. The appeal is therefore dismissed.

DISMISSED.

Statement of the case.

ETHAN MELTON ET AL. v. PASS R. TURNER.

1. On the second of April, 1844, there was no law requiring a land certificate sold at administrator's sale to be sold at the court house door of the county in which the land was situated upon which the certificate was located; before the issuance of patent the interest of the owner in the certificate being but a chattel interest, the same could be sold as other personal property.
2. Uninterrupted peaceable possession for ten years of land gives the possessor title to 640 acres without any other evidence of title.
3. The record of a deed in a county where the land was situate at the time of recording, though upon subdivision of the county subsequent to the record of the deed the land may fall within the territory taken off, is notice to purchasers.

APPEAL from Navarro. Tried below before the Hon. F. P. Wood.

Suit by appellee filed January 19, 1872, to recover 1280 acres of land known as the headright of Jos. Young, deceased, lying in Navarro county. The appellants attempted to deraign title through a deed made by Asa Wheeler, administrator of the estate of Joseph Young, deceased, to Charles Bigelow, the purchaser at administrator's sale. The introduction of this deed in evidence was objected to, because it appeared upon its face that the land had been sold by the administrator at the court house door in the county of Harris, and not in the county of Robertson, where the land was situate at the time of the sale. This objection was sustained. The sale was made April 2, 1844.

The fourth, fifth and sixth instructions asked by plaintiff and given on the trial are as follows, viz:

"4. To entitle the defendants, or any of them, to recover under the plea of ten years, they must have lived all the time on the land, claiming the same as their own property for the entire period, not including the time from the twenty-eighth of January, 1861, to thirtieth of March,

1870, and this possession and claim must have continued for the full period of ten years before the institution of this suit, without being interrupted by any other claim for the same property or land.

"5. If the jury believe that Brunbelow and Meador lived on the land from the time of their first settlement till they purchased from Cowan, without claiming any ownership of the same, then that time will be excluded from ten years.

"6. The jury is instructed that in order to make the defendants possessors in good faith they must have believed, after searching the records of the county in which the land laid, that their title was the best title any one had to the land. If the records showed a deed through which the defendants deraigned their title to be on its face null and void, then those claiming under that deed cannot be possessors in good faith."

The defendants pleaded possession of the land for ten years. Brunbelow testified that Meador, the deceased husband of one of the defendants, and himself, settled on the land as squatters, and had lived on it for sixteen years; that about two years after the beginning of the late war, Cowan, a purchaser under Bigelow, settled on the land, claiming ownership, and sold to Meador and witness, who, though living on the land, claimed no ownership of the same before their purchase; that when Cowan claimed the land, "he showed a patent with ribbons and a big seal." They expressed their pleasure at finding an owner, and purchased and paid him for the land now claimed by them.

The record is voluminous, but the above is deemed sufficient for a proper understanding of the opinion.

Wm. Croft, for appellants.—At the Februrary term of the Probate Court, Harris county, Asa Wheeler was ap-

pointed administrator of Joseph Young, deceased. Inventory filed February 24, 1844; application for the sale of land certificate of 1280 acres, February 27, 1844; granted February 28, 1844; sale made for one thousand dollars, and receipted by deed to Charles Bigelow, April 2, 1844; deed recorded twenty-seventh of January, 1846.

The property sold was merely a land certificate, and the location made by virtue of the same. The title was inchoate, and the location liable to be lost or raised, and the certificate relocated. It was but a chose in possession of the hands of the administrator, and the purchaser of the certificate had an equity superior to the legal title of the heir. It could have been sold by the sheriff "on the premises where it is seized in execution," in accordance with the law of 1842 (Hart. Dig., Art. 1328), or by the administrator, at the residence of the deceased; and it was properly sold at the court house door of Harris county, under an order of court of competent jurisdiction.

If the property sold was a chose in action, then there was no necessity for a sale outside of Harris county under any construction of the law. That it was a chose in action, and liable as above stated, is fully supported by the decision of this honorable court in the case of Perry v. Hunt, 32 Texas, 146, and the whole opinion of the court in that case is hereby made a part of the argument in this.

The probate court had jurisdiction of the property; the sale was applied for within the time required by law. (Hartley's Digest, Art. 1023.) Sale was ordered; was made April 2, 1844, and the deed duly acknowledged for record before A. P. Thompson, the probate judge and chief justice of Harris county, who ordered the sale on the second day of May, 1844. There was no confirmation by the court of sales by administrator necessary at that

time, and the whole proceedings of the probate court became *res adjudicata*, there being no appeal, nor attempt to revise or reverse the same by any person interested in the estate from that day to this.

The purchaser at the sale, Chas. Bigelow, having bought and paid for the property, as the deed shows, could not have his rights impaired by any irregularity in the proceedings prior to the sale, nor by any act of the administrator, or of the court, after the deed was delivered to him. (Miller v. Miller, 10 Texas, 333; Allen v. Clark, 21 Texas, 405.)

The court erred in refusing to permit the deed to Bigelow to be introduced as evidence under the suggestion of good faith. The court also erred in explaining to the jury that the defendants could not go outside the county of Navarro to examine records. This is so palpable an error that no argument is necessary.

The idea that a party claiming land under ten years limitation should hold possession, "claiming the same as their own," is certainly repugnant to the law (Paschal's Digest, Art. 4624), which gives the "naked possessor" title to 640 acres "without any evidence of title," if ten years peaceable possession has been held. Charge sixth was certainly erroneous, having reference probably to Bigelow's deed recorded in Robertson county, and which the court below prohibited the defendants, claiming in good faith, from examining.

No brief for appellee has reached the hands of the Reporters.

WALKER, J.—At the time of the sale by Wheeler, the administrator of Young's estate, to Bigelow, there was no law in Texas which directed that a land certificate must be sold at the door of the court house of the county in which the land lay, upon which the certificate may

have been located. It is true the sale of the certificate carried with it to the purchaser any equity which the owner of the certificate might have acquired in the land on which it had been located, but the certificate had not yet merged in a patent; it was, therefore, only a chattel, and could be sold, as other personal property, by an administrator. It was error then in the court to rule out the transcript of the proceedings of the Probate Court and the deed from Wheeler, the administrator of Young, to Bigelow. The other errors assigned are rather the sequence of this one, except it be the fourth. This is against the charge of the court. We think the fourth, fifth and sixth charges, as asked by the plaintiff below and given by the court, are not in accordance with our statute (Art. 4624, Paschal's Digest), and are therefore erroneous. Uninterrupted, peaceable possession for ten years, under our law, gives the possessor title to 640 acres, without any evidence of title. The record of a deed in a county where the land lies, though, upon subdivision of the county subsequent to the record of the deed, the land may fall within the new subdivision, is notice to purchasers. It is unnecessary to notice further the errors assigned. The judgment will be reversed and the cause remanded.

Reversed and remanded.

The Houston and Texas Central Railway Company v. Charles Mitchell.

1. A proposition in writing to deliver a specific article "*not to exceed two hundred tons*," and with no other stipulation as to quantity, payment to be made on the delivery of designated installments, which is accepted in writing, confers no right upon the party accepting to enforce delivery to the limit mentioned, and leaves it optionary with each party to avoid the

agreement, on giving notice to the other, at any period during the time of delivery.

2. Under such an agreement, the party making the proposition is not bound to deliver, and the one accepting is not bound to pay, to full amount of the limit.
3. The measure of damages under such a contract is the contract price of the amount delivered before notice to stop delivery, and such actual damage as may result from notice to stop.
4. The party who seeks redress against another for the breach of contract is bound to use due diligence himself in preventing, as far as possible, the loss by reason of the breach.

APPEAL from Harris. Tried below before the Hon. James Masterson.

The appellee sued for the entire contract price of two hundred tons of prairie hay, at $22.50 coin per ton, alleged by him to have been cut and stacked in fulfillment of his contract, and tendered for delivery to appellant's agent and by him refused, and which was never received or used by appellant. The contract will be found copied at length in the opinion of the court.

The petition alleged that appellee, in good faith, carried out the contract, by buying a mowing machine and employing a large number of laborers to cut the hay and stack it in ricks near the line of the road; that he cut two hundred tons and stacked it as agreed on, and made a tender of it to the duly authorized agent of the company, who accepted the tender for the company; that the company, according to contract, upon the tender of the hay expressly agreed and promised, and then became liable, to pay him $4500 coin, the contract price of the hay so cut and tendered, but that payment has since been refused; wherefore he prays judgment for the whole price and interest.

Appellant answered, first, by a general denial of the facts alleged; second, that the pretended agent had no authority to make or approve such a contract, and no authority to accept tender of performance; and, third, that John E. Garey was the agent authorized to make such a

contract; that he had accepted appellee's proposal at the time alleged, but that shortly afterwards it was found that prairie hay near the railroad was so parched and burned by the summer heats that it was not suitable to be used; and that before appellee had cut any hay, and before he had incurred expenses in procuring laborers, said Garey notified appellee that the hay would not be needed, and that he should not proceed under the contract; that appellee then claimed that he had bought a mowing machine, and wished to proceed to cut the hay, whereupon said Garey offered to pay the appellee for the machine, and all other expenses he had then incurred; but that appellee refused so to do, and that, conspiring with others to wrong defendant, pretended and claimed to have the right to proceed and make money from his contract; and that if he ever did cut the hay, or tender any to any person, it was not received by, or known to any person authorized to act for appellant; and that if said agent did pretend to accept such tender of it, he acted without authority, and conspired with appellee to wrong and defraud appellant.

Appellee then amended his petition by way of replication. He denied the allegations made in the answer, especially denying that the contract was rescinded by Garey; and alleged, "that some time after he had entered into said contract, * * and after he had cut a large amount of said hay, and incurred an expense and outlay in the purchase of a mowing machine and other implements, and horses, mules and wagons, and in hiring laborers, and purchasing supplies, etc., necessary to carry out said contract, amounting to not less than $1500, said John E. Garey called on him, and requested him to let him have possession of said contract, for the purpose of bringing it down to Houston to show it to the directors of the railway, in order that he might counteract some er-

roneous impressions regarding it;" that he (Garey) had been written to about it, and wished to explain it, etc., and that appellee refused to let him have it, "informing the said Garey that he intended to go on and complete said contract." Further, he denied that "said hay was parched and burnt up by the sun;" "on the contrary, alleges that said hay was cut from an enclosure, which had not been grazed or trampled by the cattle, and was in better condition, and was in all respects better than ordinary prairie hay;" and that appellant, at the time the contract was made, well knew the condition and character of prairie hay, the seasons, etc. He also alleged that there was no delay in the execution of the contract; "that in a very short time after making the same, and with no other delay than was necessary to prepare, he set about complying with his contract in good faith, and in a short time he cut and stacked and delivered said hay, to-wit, two hundred tons, in accordance with his contract, and tendered the same to defendants;" and that in so doing he was compelled to incur "additional expense and outlay of not less than $750." He denied all charges of conspiracy to wrong or defraud; avers that he acted in good faith, and fully complied with contract, and incurred great expense, outlay, embarrassment, labor and trouble, and that defendant acted in bad faith, etc.

The presiding judge, among other charges, gave the following, viz:

"3. After a contract is made, it is binding on all the contracting parties, and cannot be rescinded by one of the contracting parties without the consent of the other; and the party violating the contract is liable in damages for the breach of said contract."

"6. If the plaintiff cut the hay, as he alleges, and if he offered to deliver it, but was prevented by the defend-

ant from actually delivering it, by the refusal on part of defendant's agent; and if afterwards, without gross negligence on plaintiff's part, said hay was destroyed, he will nevertheless be entitled to recover."

Upon the issues thus presented the jury found for appellee the full amount of the contract, amounting to $5094, for which judgment was rendered.

Gray & Botts, for appellant.—*First.* As to the construction of the contract. We contend that the time, purpose and meaning of it, was to give appellee the privilege of cutting hay to the extent it might be needed by appellant, deliverable in quantities of twenty-five tons at a time, to be paid for as delivered, not to exceed two hundred tons in all; and while he was not bound to deliver the full quantity, unless he found it convenient to do so, neither was appellant bound to receive more than it needed; of course, however, subject to reasonable notice of withdrawal by either party.

It will be difficult to resist the conclusion that the parties so understood the contract at the time it was made. On the construction of contracts, we refer generally to the elementary works, and to Swisher v. Grumbles, 18 Texas, 177; Haldeman v. Chambers, 19 Texas, 39; Dorr v. Stewart, 3 Texas, 479.

But it was argued, and the court so charged, that a contract once made was a mutual transaction, which could not be rescinded without the assent of both parties. This is undoubtedly true, as a general proposition, but certainly cannot apply when the contract itself provides for such a contingency, as we contend this one does.

Second. As to the effect of notice to desist and refusal to carry out the contract by appellant. If we are wrong as to the true construction of the contract giving a right to rescind it, then we submit that the notice and refusal

was a breach of it, which instantly gave appellee the right of action for damages thereby incurred, but not the right to proceed and increase the damages by way of a speculation. The distinction between the right to rescind and the effect of claim of such right, being, in fact, a breach of the contract, does not appear to have been perceived by counsel for appellee nor by the court.

We submit that the mutuality of the contract ceased instantly upon the breach of it, when right of action for damages then incurred accrued to the appellee, and none whatever for his subsequent proceedings, pretended to be in fulfillment of a violated contract.

Even in cases of overseers or employees, the doctrine asserted by appellee is not sustained by former decisions of this court. There are many cases showing that immediately on the breach of such contracts right of action for damages accrues, and of course the supposed continuity or mutuality of contract ceased.

Meade v. Rutledge, 11 Texas, 52–54, is against the special court doctrine of Smith v. Lipscomb, and establishes our view. So do the cases of Hassell v. Nutt, 14 Texas, 266; Nations v. Cudal, 22 Texas, 552; and Dorr v. Stewart, 3 Texas, 479.

It was also held that where the contract is divisible, and performance is prevented by the death of the obligor, there should be an apportionment and recovery for the value of part performed. (McMullen v. Kelso, 4 Texas, 237.)

This illustrates the principle involved, though not directly in point, on the facts of this case. But the doctrine is well settled that the effect of the abandonment of a continuing contract by the obligor is to give the right to the obligee to recover for the part then performed, and damages. (Hillyard v. Crabtree, 11 Texas, 263; Carrol

v. Wield, 26 Texas, 148; Sedgwick on Measure of Damages, 215 and note.

Third. As to the measure of damages for the breach of the contract. We submit that it is undeniable law, in cases of contract broken, without deception or fraud or other extrinsic grounds for special damages, that the measure of damages is "compensation for the loss sustained"—that is, the actual damage at time of the breach, or necessarily resulting from it. (Sedgwick on Damages, p. 25, *et seq.*)

"In cases of prevention by the party, or tender and refusal, the plaintiff has a right of action on the special contract, prevention or refusal being equivalent to performance; but in this case he must declare specially; * * * and the measure of damages, according to the late cases, is not the whole price agreed to be paid, but the actual loss sustained, which will consist of the value of the services rendered, and the damages sustained by the refusal to allow performance of the rest of the contract." (2 Smith's Leading Cases, 7th Am. Ed., p. 53, citing many cases; Shannon v. Comstock, 21 Wend., 457; Heckler v. McCrea, 24 Id., 9; Wilson v. Martin, 1 Denio, 602; Spencer v. Halstead, Id., 606; Boardman, Adm'r, v. Kesler, 21 Vert., 78–84; Clark v. Marsiglia, 1 Denio, 317.)

It is held that in such cases of broken contract "it is in fact an action to recover damages for not being permitted to perform the contract." (Clark v. The Mayor, etc., 4 Coms., 339; Phila. R. R. v. Howard, 13 Howard, 344; Derby *et al.* v. Johnson *et al.*, 21 Vert., 18–22.)

Crank & Wilson, for appellee.—The construction of the contract, as given in the charge of the court, it is submitted, was eminently correct. The cardinal principle governing the construction of contracts is that of mutu-

ality. The contract must be so construed by the court, as to do justice between the parties, by enforcing a performance of their agreement according to the sense in which they mutually understood it at the time it was made. (Chitty on Contracts, p. 74; 2 Parsons on Contracts, pp. 7, 8, etc.) The whole contract should be considered in determining the meaning of any or all of its parts. (2 Parsons on Contracts, p. 13, note R.) Applying these rules, it is evident that the court rightly construed the contract. From examining the contract, it is evident that the appellee, Mitchell, was bound to cut, and deliver as specified, two hundred tons of hay. If he was bound to cut and deliver this quantity, surely it cannot be contended that the appellant was not bound to receive and pay for that amount. Such was the intention of the parties. The obligations of the contract were mutual.

The fact that the appellant contracted to pay for the hay as each twenty-five tons were delivered, cannot be fairly construed to mean that upon the delivery of any twenty-five tons either of the contracting parties had the right to end the contract. This provision was evidently intended as a mode of payment, in order to enable Mitchell to comply with the contract, as it is evident from all the testimony that Mitchell had but little money with which to carry out the contract, and a payment for the hay in installments would enable him more easily to comply with his undertaking.

It is submitted that upon the measure of damages there is no error in the charge of the court, and that the verdict is just.

The rule governing the measure of damages is compensation for the loss sustained. (Sedgwick on Measure of Damages, p. 25, *et seq.*)

The proper measure of damages for breach is the value

of the bargain. (Sedgwick on Measure of Damages, pp. 219, 220, note 1, *et seq.*

Courts will not undertake to modify the contracts of parties, but simply to expound them. (Ib., p. 220, note 1.)

In an action for breach of contract the contract price is the measure of damages, unless the defendant shows, by evidence, that the damage actually sustained is less. (Sedgwick on Measure of Damages, p. 221, note 1.)

In a late case reported in the April number of the American Law Register for 1872, of Garsed v. Turner, decided in the Supreme Court of Pennsylvania, citing and relying upon Hoy v. Grenoble, 10 Casey, 9, it was held, "That if a contract was broken by the defendant, the plaintiff is entitled to be put in the same condition, pecuniarily, as he would have been if the contract had been kept." "The plaintiff is entitled to what he would have made out of the contract had it been kept." "The proper measure of damages for breach of contract is the value of the bargain—the amount which would have been received if the contract had been kept." (See American Law Register, April number, 1872, p. 259, *et seq.*, Garsed v. Turner, and authority cited thereon.) In Smith v. Lipscomb, 13 Texas, 538, it was held, "That where a party, in whose favor something is to be done, in consideration of his promise to pay a certain sum of money, prevents that performance, and the other is not in default, the money may be recovered as if the act had been performed." (See also Rose v. Railroad Company, 31 Texas, p. 60.)

WALKER, J.—This is a suit brought to recover the entire contract price of two hundred tons of hay, upon the contract of which the following is a copy:

"I propose to cut and place in ricks or stacks, for the H. & T. C. R. W., prairie hay, not to exceed two hundred tons, at points along the line of said road adja-

cent to the place where the hay may be cut, at twenty-two and one-half dollars coin per ton, payments to be made by said company as each twenty-five tons of hay is cut.

"The above proposition is made for your acceptance or rejection, as agent of the Houston and Texas Central Railway Company.

"Respectfully,

"C. S. MITCHELL.

"Approved: WM. JENKINS."

Across the face is written as follows:

"Your proposition is accepted.

"JOHN E. GAREY.

"The within proposition is accepted for and in behalf of H. & T. C. R. W. Co.

"WM. JENKINS,
"Supt. of Const."

We are compelled to take a somewhat different view of this contract from that taken by counsel on either side of the case. The contract is not mutual. Mitchell was not bound to cut and put up any particular number of tons of hay for the appellant. He could, if he desired, put up two hundred tons; but if he had quit cutting when he had cut one ton, the appellant could not have compelled him to cut any more, nor could damages have been recovered for the breach; but the evidence places the rights of the parties in this position. Mitchell had a right to go on and put up any amount of hay within the limit of two hundred tons, unless notified by the appellant that it would not accept the hay at the contract price. The evidence shows that about twenty-five tons of hay had been cut at the time when notice was served upon Mitchell that the company did not want the hay. If then the contract had been mutual, Mitchell would have been

entitled to recover the contract price for the twenty-five tons of hay so cut, and his actual loss or damage by reason of the company failing to receive one hundred and seventy-five tons at the contract price.

But Mitchell was not bound to cut two hundred tons of hay, nor is the appellant bound to pay for it. Mitchell could have been stopped under this contract by a notice at any time. He probably intended to leave it optional with himself whether he cut one or two hundred tons; and thus the law leaves it optional with the appellant to take one ton or two hundred tons; but the company is nevertheless bound to take all the hay at contract price which Mitchell had put up before he was notified that the company did not want the hay. When it is claimed that the contract furnishes the measure of damages, it must not be understood that the party who is ready to perform his part of the contract can recover of a defaulting party the entire contract price. The measure of damages in such case is not the full contract price; but the damages must be measured by the actual injury sustained. If it ever was a rule that the contract furnishes the measure of damages, it is subject to the rule that compensation is only given for actual loss. (Robinson v. Varnell, 16 Texas, 382; The Cincinnati and Chicago Air Line Railroad Company v. Rogers, 24 Ind., 103; Jones v. Van Patten, 3 Ind., 107.)

Mitchell, in this case, should have observed the rule that a party who seeks redress against another for breach of contract, is bound to use due diligence himself in preventing, as far as possible, the loss by reason of the breach. Had this been a contract binding on both parties, for the sale of two hundred tons of hay, the company would have been bound by the facts in the case to pay the contract price for twenty-five tons, and the actual loss in damages which Mitchell sustained by reason of

not being allowed to fulfill the entire contract; but this was not such a contract, and all the company is bound to pay is the contract price for the twenty-five tons cut before notice. This opinion is not to exclude the plaintiff from recovering for any amount of hay cut under the contract, before notice by the company of the refusal to receive any more.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

HENRIETTA SCHRIMPF V. JOSEPH AND JULIA SETTEGAST.

1. When a citizen or subject of a foreign government emigrates to this State, and, after residing here long enough, makes the usual declaration before the clerk of a court of record, of his *bona fide* intention to become a citizen of the United States, but dies before he has remained long enough to receive his certificate of citizenship, his children, born abroad, who came to Texas with the father before attaining the age of seventeen years, take the estate of inheritance in the lands owned by the father, and, on attaining the age of twenty-one years, become citizens of the United States and of the State of Texas.
2. Possession and improvements by the vendee under a parol contract for the sale of land entitles the vendee to a specific performance on payment of the purchase money.

APPEAL from Harris. Tried below before the Hon. James Masterson.

This case was before this court at a former term, and will be found reported in 35 Texas, 323. It was then remanded for trial, reversing the decision of the court below, which sustained appellant's special demurrer to appellees' petition on the ground that no title to the land could vest in the plaintiffs by the death of their ancestor in 1853, under the laws then in force, because of the alienage of their ancestor and themselves.

Statement of the case.

The petition, among other allegations of equitable right by parol contract of purchase, averred that a deed for the land had been executed by Schrimpf, and that title had vested in Settegast before his death. This material fact was, therefore, admitted by the demurrer. The decision of this court, as understood and enforced on the trial below, was, in effect, that a resident alien, who had made declaration of intention to become a citizen, but who died before being naturalized, was yet competent and capable, as a citizen, both to take and to hold land by title; and, also, that upon the death of such resident ancestor, the title to lands was transmitted from him to his minor children, and that they also were capable of taking, and did take, title by descent from the ancestor, and that upon coming of age they could maintain an action for possession of the land.

This decision and the construction of the opinion of this court was carried out in its full extent by the court below, on the trial had there.

The pleadings are the same as on the former appeal, except that the demurrer was overruled and a trial had on the answer denying the merits alleged. The petition, as amended, alleged that Settegast and appellees were natives of Prussia; that he emigrated in the year 1851 with his family, including his infant children, the appellees; that soon after he made a parol contract for purchase of the land with Schrimpf, accompanied with possession under it, and made valuable improvements, then worth $1000, and resided and died on the land in 1853; that he paid the purchase money and received a deed from Schrimpf, which had been lost or destroyed by Schrimpf after their ancestor's death in 1853; that if in fact the money had not been paid and no deed made, appellees were now ready and willing to pay the money and interest; that their ancestor had made a declaration of inten-

tion to become a citizen before the clerk of the District Court of Harris county, in the year 1853, and had died in the fall of that year without having been naturalized; but that the appellees had recently, since they came of age and since Schrimpf's death, been admitted as citizens under the naturalization laws; and they prayed for absolute judgment for the land, or for a decree for specific performance of the parol contract by execution of title and possession to them, as the facts might turn out on trial.

To this petition the defendant (appellant) demurred, which demurrer was overruled, and also answered under oath to the merits. She did not controvert the allegations about the foreign nativity of the appellees and their ancestor; nor of his declaration of intention to become a citizen and having died before being made a citizen; nor of appellees having recently been naturalized; but she did deny all knowledge of the sale of the land, denied that purchase money had ever been paid, denied that any deed had been executed, or any written contract, but said that the possession of the land had been allowed during Settegast's life, and that the improvements, which had been destroyed by fire, had been made by Schrimpf as a means of assisting his destitute countryman and family, and not as a matter of bargain and sale.

The verdict of the jury found against the alleged payment of the purchase money, and against the existence of any deed from Schrimpf, but that there was a parol contract for sale, and possession and improvements, the whole purchase money remaining unpaid.

Appellant's motion for a new trial, on the ground of errors in the charges of the court and rulings on the evidence, was overruled, and also appellant's motion in arrest of judgment upon the verdict.

The charges were in accordance with the decision of the

case on the former appeal. We find no statement of facts in the transcript.

Grey & Botts, for appellant.—That William M. Settegast was an alien at the time of his decease is too manifest to require argument. The intention to become a citizen at the time of his decease is an admission that he was not a citizen, unless indeed the intention is in fact the act itself. Intentions do qualify acts, but are not the very deeds.

Appellees admit that they were not then citizens, for they allege that they became naturalized as citizens more than twenty years after the death of their father. From this it is clear that they were aliens at that time, as it is that their father was an alien. They were all resident aliens.

The next point, which arises also on the charge of the court, and on the motion in arrest of judgment upon the verdict, is, whether it be true that an alien who had made a parol contract for land and was in possession, before making a declaration of intention to become a citizen, but afterwards made such declaration before a clerk, did thereby acquire such equitable title as he could enforce by law against a citizen, before being admitted to citizenship; and further, whether upon the death of such alien in 1853, before admission to citizenship, the law would transmit such title from him by inheritance to his alien children as would entitle them, fifteen years afterwards, upon becoming citizens, to enforce such a contract by law, the purchase money having never been paid before suit.

We must briefly as possible premise certain propositions argued formerly, and not decided by the opinion of this court on the former appeal. These are embraced in the general statement that the history of legislation from

the earliest period in Mexico, the Republic of Texas, and State of Texas, down to February, 1854, shows hostility to aliens holding land; and that trammels were thrown around its transmission by inheritance or devise by those who were allowed to hold title while residents.

Your former opinion cites a statement from Escriche, in the decision made by that chief justice, in Yates v. Iams, 10 Texas, 168; and you approve that statement as being his observations on the laws of Spain, relating to aliens; and you say that they were more liberal to them than the common law. We now respectfully call your attention to the fact that the chief justice did not concur in that statement as being correct; and, also, to the parts of that opinion which related to the case decided, under the laws of the Indies and of Mexico, in 1823.

In the case of Holliman v. Peebles (6 Texas, 673), abandonment of the country was, without office found, held *ipso facto* the vacation of the grant to Holliman; and that an alien could not sue for land. In Yates v. Iams, it was held that an alien heir did not inherit from a citizen holding title to land. These cases are followed by numerous others, all showing the stringent rules of Mexican policy, even as against foreigners, who had been invited and settled in Texas as colonists.

"An alien could not take or hold under the Mexican law; and it was error to strike out a plea that the plaintiffs were aliens when they purchased." (Clay v. Clay, 26 Texas, 30; and Lacoste v. Odum, Id. 459.)

"Aliens could not inherit, under the Mexican law, prior to the Constitution of the Republic." (Hornsby v. Bacon, 20 Texas, 559.)

"It is too well settled, by repeated decisions of this court, to be longer regarded as an open question, that, at the period of the death of Charles Baird (1833), his heirs,

being aliens, could not inherit his estate." (Blythe v. Esterling, 20 Texas, 568.)

"The right of the alien heir to claim land must be tested by the laws anterior to the Constitution of the Republic of Texas; and by them such right cannot be sustained." (Middleton v. McGrew, 23 Howard, 48, 49, citing Mexican Ordenos y Decretos, Vol. IV., 155, and various Texas decisions.)

The laws of the Republic and State, and the former decisions of this court under them, show some changes of policy from the Mexican laws in regard to the rights of aliens to real estate. They indicate an enlargement of view and more liberality, yet subject to several serious restrictions. The disabilities were not entirely removed.

They allowed aliens to take and hold by titles emanating directly from the government, and with that right, of course, were recognized all rights and powers to enforce them by suit, pertaining to a citizen as incidents of that right. In this was included the powers to sell, devise or transmit to heirs, and of their heirs taking title by descent. The fact that the titles emanated from the government was the controlling element in many of the decisions favorable to aliens and contrary to the common law. Such decisions may mislead as the law of cases where titles did not so emanate, unless the distinction be carefully observed.

Other cases, controlled by the fact that the title emanated to aliens from government, are Norvell v. Finch, 15 Texas, 165; Kilpatrick v. Sisneros, 23 Texas, 113; Hays v. Barrera, 26 Texas, 78.

Again, these laws allowed an alien to take title by purchase from a citizen, and also to hold against all except the government, although the Constitution of 1836 and the common law forbid an alien to hold land. In case of a purchase by an alien, it was held that the title passed in

trust for, or limited by the power of, the government to escheat by office found or other act for that purpose. (Crosse v. Devalle, 1 Wallace, 13, and cases there cited; Sharswood's Blackstone, Vol. 1, 371; and 2 Kent Com., 53–54.) Until such action the title remained in the alien purchasing, so long as he lived; and if he became a citizen by naturalization, or by annexation or treaty, before such action by government, then the absolute title vested in him. Such was the case of Osterman v. Baldwin, 6 Wallace, 116, 122, the real purport and effect of which decision is mistaken in your former opinion. It does not conflict with the decision in Barrett v. Kelly, 31 Texas, 476, but accords with it, for the latter distinctly admits that proposition, but was decided on another ground, viz., that the grant to the alien defendant had not been declared void by government. That point in Osterman v. Baldwin is supported by Barrett v. Kelly, and various other Texas cases. (See Cryer v. Andrews, 11 Texas, 183; Babb v. Carroll, 21 Texas, 770; Lee v. King, 21 Texas, 582; Barclay v. Cameron, 25 Texas, 242; Christy v. Scott, 14 Howard, 294; and Wardrup v. Jones, 23 Texas, 494.)

In Portis v. Hill (30 Texas, 530), it was held that "alien heirs of citizens of Texas had the right to inherit in coparcenary with citizens, under the constitution and laws of Texas." The same doctrine was held also in Barclay v. Cameron, 25 Texas, 240, and was recognized in Cryer v. Andrews, 11 Texas, 170; and whenever the law gave rights to aliens it also gave them the remedies necessary to enforce them. (White v. Sabariego, 23 Texas, 246.)

These cases, however, hold also that the title thus descending from a citizen to alien heirs was a defeasible title, dependent on their performance of the conditions, and that upon non-performance the title vested in or was liable to escheat to the State. (See especially Barclay v. Cameron, 25 Texas, 241.)

Argument for the appellant.

That aliens generally could not maintain suits for land is determined in numerous cases. Hardy v. DeLeon, 5 Texas, 240, and White v. Sabariego, 23 Texas, 244, are direct to the point. So are Holliman v. Peebles, 1 Texas, 673; Yates v. Iams, 10 Texas, 174; and Barrett v. Kelly, 31 Texas, 482.

It is contrary to the policy of common law that an alien should plead or be impleaded touching lands in any court in the kingdom. (2 Bacon's Ab., Title, Uses and Trusts, E., 89.)

The same doctrine is held in courts of equity. (*Vide* 1 Daniel's Ch. Practice, 53; 2 Spence's Eq. Jur., 14; Orr v. Hodgson, 4 Wheaton, 453.)

As directly applicable to the case at bar, not merely on the general disability of aliens, but as showing the character of claim, and the mode of relief which Settegast, the ancestor, might have had for value of his improvements in his lifetime, and which only could vest in his alien children, we cite the following:

"An alien could not hold land in the Republic; therefore it would have been error to decree a conveyance to him in this suit; yet if the lands were taken in payment of debts due the alien, a court of equity would have ordered the land to be sold and the proceeds paid over to him." (Merle v. Andrews, 4 Texas, 216.)

Settegast, as an alien, could not transmit his claim of title to his children, alien or citizen.

That such was the common law we cited the following: "As aliens cannot inherit, so far they are on the level with bastards; but as they are also disabled to hold by purchase, they are under still greater disabilities; and as they can neither hold by purchase nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden, because they have not in them any

inheritable blood." (2 Sharswood's Blackstone, 250; 2 Kent's Com., 53, 54; and to the same effect is 1 Washburn on Real Property, p. 63, 3d Ed., and notes.)

"The estate of which an intestate alien dies seized vests in the State without office found." (Barclay v. Cameron, 25 Texas, 240; Barrett v. Kelly, 31 Texas, 483; Thomas v. Gray, 1 Littell, 149; Slater v. Mason, 15 Pickering, 345; Fairfax v. Hunter, 7 Cranch, 603; Montgomery v. Dorion, 7 N. H., 475; Levy v. McCarty, 6 Peters, 102; Spratt v. Spratt, 4 Peters, 393; Moers v. White, 6 Johns. Ch., 360; People v. Conklin, 2 Hill, N. S., 69; Brown v. Sprague, 5 Denio, 545; Jackson v. Adams, 7 Wend., 368.)

We specially call attention to the following cases as applicable to the case at bar:

"An alien cannot at common law be heir to any one, nor can he transmit inheritable blood." (Smith v. Zaver, 4 Alabama, 99.)

"An alien cannot take by descent where the ancestor dies after preliminary declaration of intention to become a citizen, but before actual naturalization." (Foss v. Crisp, 20 Pickering, 121; McDaniel v. Richards, 1 McCord, 187; Eldon v. Doe, 6 Blackf., 341.)

Similar doctrine was held by the Supreme Court of the United States in Blight's Lessee v. Rochester, 7 Wheaton, 535. The decisive point in that case was thus announced by Chief Justice Marshall: "James Dunlap, therefore, if he continued to be an alien, continued liable to all the disabilities of alienage, one of which is an incapacity to transmit lands to heirs; consequently when he died the next of kin could take nothing by descent."

Now comes the query, had this rule been modified or repealed by any law of Texas? Appellees say it had, and the burden is on them to establish the change.

That assertion is based on the Martin Kostza case and

Judge Lindsay's construction of the fourteenth section of Act of Descents of 1840, and ninth of said Act as amended in 1848.

The origin and history of that clause of the statute fully elucidate its meaning, and that its purpose was plainly expressed according to the usual and plain meaning of its carefully considered and well chosen words, and that purpose was entirely different from what the learned justice supposed. It was not an original conception of the Texas Congress or Legislature. It was not framed by the Texas Legislature for any peculiar adaptation to Texas policy, or to make any peculiar modification of Texas law as to aliens. It originated in England in the time of William III., and is known there as an act of the eleventh and twelfth years of his reign, Chapter 6. It was then readopted in Virginia, Maryland, New York, and other colonies and States, and was copied in the Texas act *in totidem verbis*. The necessity for it in England, and its policy there, originated in the condition of British subjects of King William III. after the revolution of 1688 and abdication and exile of James II., and in consequence of the emigration or exile of other subjects during previous periods of political trouble. Many Dutch subjects of the new king had come over with him from Holland and had become British subjects, but their ancestors and relatives remained aliens in Holland or elsewhere. Many English descendants of British subjects who owned land in England thus, upon the death of those subjects, would, by English common law, have been excluded from the inheritance of their estates, because they would have to derive their descent through some ancestor, being aliens, in Holland or France. Such a result would be most unjust to the loyal English descendants who adhered to William, and in order to secure them in their right to inherit these estates by law, this act of Parliament was

passed, changing the common law. Its simple purpose and effect was to give the estate of an intestate British subject to loyal British descendants, who could only trace title by descent through some alien ancestor from the British intestate, instead of the title being cast instantly on the crown, as it would otherwise have been by the common law. The idea that its effect was to enable aliens to hold land in England, or to enable them to transmit the title by descent to anybody, alien or subject, was never dreamed of in that day. Such a proposition would not have been admitted by the English Parliament for an instant, even to please King William himself. It needs but slight reading of the history of those times to fully comprehend how outrageous such an act would have been considered by the English statesman.

The construction of Justice Lindsay is also opposed to the express decisions of the Supreme Court of the United States in the cases of McCreery v. Somerville, 9 Wheat., 354; and McKinney v. Sabariego, 18 How., 238.

Such a construction has never been advanced in any case in which that clause of the act has come under review. It has been considered in Johnson v. Sanders, 2 Leigh, 109; Jackson v. Green, 7 Wendell, 333; Jackson v. Fitzsimmons, 10 Wendell, 1; Levy v. McCarty, 6 Peters, 102; and by Judge Brockenbrough in Vint v. Heirs of King, 2 American Law Register, 719. In none of them was such a construction even mooted. Such a construction would necessarily have caused a contrary decision in Blight's Lessee v. Rochester, before cited.

That a court of equity would not aid Settegast himself, as an alien, to enforce specific performance, we think clearly shown by the cases already cited. But supposing it possible that such a conclusion may be attained—for all things seem possible—we now submit that the case made

on the record does not entitle appellees to specific performance at this day.

"The principle upon which courts of equity exercise their jurisdiction in decreeing specific performance of parol agreement, accompanied by part performance, is the fraud and injustice which would result from allowing one party to refuse to perform his part, after performance by the other upon faith of the contract." (Buckmaster v. Harrop, 7 Vesey, 346; Mandy v. Joliffe, 5 My. and Cr., 177.)

Now, can it be said to be fraud or injustice for a party to refuse to convey land to an alien, who is prohibited by law to hold it, and had paid no part of purchase money, when he can be compensated in damages for the former improvements claimed as part performance? We think not.

It was held in England, by Sir William Grant, that the fact that money spent in repairs, easily admitted of compensation without execution of the parol agreement, was a reason for not considering it part performance. (France v. Dawson, 14 Vesey, 386; and similar doctrine was held in O'Reilly v. Thompson, 2 Cox, 271.)

Where the acts relied on are proper to be brought before a jury, and can be answered in damages, they will not be considered as part performance. (South Wales Railway Co. v. Wythes, 1 K. and J., 186.)

It will also be seen that the only allegations of part performance are generally stated, viz: That their ancestor purchased, was in possession and resided on it two years, made valuable improvements, which are described, and the extent of value alleged at $1000. These allegations constitute the whole case of part performance found by the jury, who also found against the allegation of payment of any part of purchase money. Will the court then strain the statute, make law outside of it, and compel

a title in favor of an alien's heirs, upon their offer to pay the purchase money, after the lapse of fifteen years? This is the decision which was made in the court below, and which you are asked to affirm!

We respectfully submit that such a decision is not expected by us. If such be the law, then the estates of decedent citizens are exposed to loss and ruin by the speculative propensity of the heirs of aliens half a generation after the alleged transactions. And the more infamous the charges they may see fit to make against the dead man, benefactor of their ancestors, without proof to sustain them, the more likely they are to sustain their unjust claims against the heirs of dead citizens.

No brief for appellees has reached the hands of the Reporters.

WALKER, J.—The reconsideration of this case has not changed our former opinion upon the main question involved. We do not now propose to deliver an opinion to take the place of that formerly delivered, touching the rights of the appellees to inherit property from their father. W. M. Settegast, deceased, was a native of Prussia, who emigrated to the State of Texas and settled here in the year 1851. His sons, the appellees, were children of a tender age at the time their father came here. W. M. Settegast purchased the land in controversy from John W. Schrimpf, entered into possession, and made valuable and permanent improvements. After remaining in the country long enough, he made the usual declaration before the clerk of a court of record, of his *bona fide* intention to become a citizen of the United States, but died before he had been here long enough to receive his certificate of citizenship. The appellees, on coming of age, became citizens of the United States and of

the State of Texas. It is our opinion that on the death of their father they took an estate of inheritance in his land.

The second branch of this case demands our attention. The verdict of the jury gives the appellees the land on payment of the purchase money, and it is contended that the appellees are not entitled to the land, but must be content with payment for their improvements. We think, however, the doctrine is well settled in our State, that possession and improvements under a parol contract of sale entitles the vendee in equity to a specific performance, on tender or payment of the purchase money.

The judgment of the District Court is therfore affirmed.

AFFIRMED.

GEO. W. BROWN, ADM. OF ESTATE OF THOS. WALKER, DECEASED, v. THE HEIRS OF THOS. WALKER.

An administrator who is himself a creditor of the estate he represents, cannot charge the estate, on payment of his own debt, the five per cent. commission allowed to administrators by law for paying out money to the creditors.

APPEAL from Grimes. Tried below before the Hon. J. R. Burnett. The facts appear in the opinion of the court.

J. C. Hutcheson, for appellant.

Boone & Goodrich, for appellees.

WALKER, J.—This is an appeal from the order of the District Court, refusing to allow the appellant the five per cent. commission allowed to administrators by law for paying out money to creditors. The administrator was a creditor of the estate himself to the amount of about five thousand dollars; he collected the money

necessary to pay this debt, and the court has allowed him five per cent. for collecting, but he has not paid it out to any third person, as the law contemplates. The money is yet in his hands, and he being the creditor of the estate, if the estate is solvent, will be allowed to retain it in discharge of his own debt; but he pays it out to nobody; when it comes into his hands, on certain conditions it is his money, and he is not entitled to a commission for paying money to himself.

The judgment of the District Court is right, and is affirmed.

AFFIRMED.

W. H. KEMP v. THE STATE OF TEXAS.

1. The discretion confided in the Judge by Article 3046, Paschal's Digest, in allowing testimony to be introduced on the trial of a criminal cause at any time before the argument of counsel is concluded, will not be made the subject of revision in the appellate court, unless it appear that the discretion has been abused to defeat the ends of justice.
2. On trial under a charge for driving cattle from their accustomed range, without consent of the owner, evidence that the defendant acknowledged to the inspector that he had no bill of sale from the owner, and turned the cattle loose; that he again gathered the same cattle, and afterwards confessed in another county to which he had driven them that he had no bill of sale—*held*, sufficient evidence of want of consent of the owner, in the absence of evidence on the part of defense of authority from the owner to drive.
3. No new trial will be granted on account of newly discovered evidence, which is only cumulative in its character.

APPEAL from Hamilton. Tried below before the Hon. J. P. Osterhout.

Indictment for driving cattle from their accustomed range without the consent of the owner. The record does not disclose the character of the testimony which the

District Attorney was permitted to introduce after the argument had begun. The facts on which the conviction was obtained are substantially stated in the opinion.

McGinnis & Lowry, for appellant.

Attorney-General, for appellee.

OGDEN, J.—Article 3046, Paschal's Digest, provides that upon the trial of criminal cases, "the court shall allow testimony to be introduced at any time before the argument of a cause is concluded, if it appear that it is necessary to the due administration of justice." This statute was intended to give the District Court great discretion in the admission of testimony; and in order that justice may be administered in all cases, it has materially changed the rigid rule which had hitherto obtained, in regard to the admission of evidence. It is believed that the discretion thus confided to the District Court was intended not to be a subject of revision by the appellate court, unless it be made to appear that the discretion has been abused to defeat the ends of justice. In the case at bar, it is believed that the court exercised that discretion in full accordance with the letter and spirit of the law, and that the ruling in that respect is not properly a subject for revision.

The proof that the defendant had gathered cattle not his own; that when called upon by the inspector, acknowledged that he had no bill of sale from the owners, and because of the want of the bill of sale, consented to turn the cattle loose; and then having gathered the cattle again, and driven them into another county, and when there required to produce a bill of sale, again confessed he had none, is sufficient proof of the want of consent of the owner to authorize a conviction; unless, as a matter of defense, he had rebutted the presumption

raised by these facts, by proving his authority or the consent of the owner. The charge of the court, therefore, complained of in the motion for a new trial, was, under all the circumstances surrounding this case, substantially correct, and we do not feel called upon to disturb the judgment because of any error complained of in that charge. Neither did the court err in overruling the motion for a new trial, on account of the alleged newly discovered evidence. The testimony, if admitted, would have been wholly irrelevant, and entirely foreign to the accusation against the defendant below; besides, if admissible at all, it would have been cumulative evidence, for the very facts proposed to be proven by Barrow had already been proven by Snow; and it has repeatedly been held, that no new trial will be awarded to let in newly discovered cumulative evidence.

Being unable to discover any sufficient error in the judgment of the District Court to require a reversal of the same, it is affirmed.

AFFIRMED.

JOHN GORMAN ET AL. V. THE STATE OF TEXAS.

A bail bond which describes A. B. as principal "conditioned, that whereas an indictment has been preferred against A. B.," etc., "now if the above bounden ———— shall make his personal appearance at the next term," etc., if in other respects good, is not vitiated by the failure to insert the name of A. B. after the word "bounden," but may be enforced as the bond of A. B.

APPEAL from Bastrop. Tried below before the Hon. J. P. Richardson.

Jones & Sayers, for appellant.—The omission of the name of the principal, to-wit, "John Gorman," in the

condition of the bond, is fatal. The bond being statutory, must comply in letter as well as in spirit with the requirements of the law, upon which its validity depends. By reference to Article 2732, Paschal's Digest, it will be perceived that the second requisite of a bail bond is imperative, and unless this requirement is satisfied the bond will be nugatory. (Daily v. The State, 4 Texas, 417; The State v. Cotton, 6 Texas, 425; Cotton v. The State, 7 Texas, 547; McDonough v. The State, 19 Texas, 294.) In the case at bar the name of the principal is omitted, and that fact should have been held as a reason sufficient for the discharge of the defendants (appellants) in the court below.

Attorney-General, for appellees.

OGDEN, J.—There is no error in the judgment of the District Court in this case. John Gorman, as principal, with others as sureties, entered into bond in the sum of $200, conditioned that, whereas, an indictment had been preferred against John Gorman, etc. * * Now if the above bounden ——— shall make his personal appearance at the next term of the District Court, to be holden at the court house in the town of Bastrop, on the fourth Monday in November, 1871, to answer said indictment, etc. It is contended that the blank in the condition after bounden vitiates the bond for uncertainty, but we do not so understand the force of the bond nor the requirements of the statute.

John Gorman was the principal in the bond; he was the party indicted, and it is very clear that he was the defendant, and the one to answer to the indictment found against him, and if his name had been inserted in the blank it would not have made the conditions more certain or definite. The above bounden meant John Gorman, the

defendant, and could, by no legitimate construction of the language or the law, have reference to any one else.

The judgment is affirmed.

AFFIRMED.

FRED. ENDE v. P. H. W. SPENCER.

Where the principal debtor, against whom several judgments were rendered by a magistrate, was dead and his estate insolvent, the magistrate dead and his records lost, and the amounts of the judgments aggregated over one hundred dollars—*held*, that the surety on the bonds to stay execution might be sued in the District Court for the amount of the judgments.

APPEAL from Hunt. Tried below before the Hon. W. H. Andrews.

Appellant filed his petition in the court below upon two judgments rendered by a justice of the peace against Nathaniel Hine on the sixth day of October, 1861. Executions were stayed by appellee, as surety, within ten days; the aggregate amount of the judgments exceeded one hundred dollars. The petition, in addition to stating the rendition of the judgments and entering stay of execution, alleged in substance that the principal, Nathaniel Hine, was dead, and his estate insolvent; that the docket of the justice and papers in the case were lost, and the justice dead. The petition prayed a recovery for the amount of the judgments, with interest and costs. To this petition the court sustained a general demurrer, from which an appeal was taken.

Throckmorton & Brown, for appellant.—There was no data from which to substitute the judgment; all of the papers are alleged to have been lost. If no substitution could have been made, either for want of authority for

the proceeding, or because there was no data, then the remedy must be by suit. If the judgments were each for less than one hundred dollars, but in the aggregate more than that sum, a suit might have been commenced upon each in the justice's court, or upon both in the District Court. This is in strict accord with the decision of Lander v. Rounsaville, 12 Texas, 195.

W. C. Jones, for appellee.—Plaintiff's remedy, if any he had, was by motion in the justice's court where the two judgments sued on in this cause were rendered, setting forth the loss or destruction of the papers and records in each cause. (Arts. 4969 and 4970, Paschal's Digest.)

WALKER, J.—This is an appeal from the judgment of the District Court sustaining a general demurrer. The appellee had become security for stay of execution rendered against one Hine in 1861 in a justice's court. The justice was dead, and his docket and all the papers in the cases lost or destroyed. The plaintiff below brought his action in the District Court to revive these judgments. The case of Lander v. Rounsaville, 12 Texas, 195, was a similar case, except that in that case the plaintiff sought to enforce a vendor's lien. But the reasoning of the court would sustain the right of the plaintiff in this case to bring his action in the District Court, and we do not see any objection to it. The judgments may not have been dormant, but they would have to be revived or substituted; and the amount being within the jurisdiction of the District Court, there can be no objection to suing in that court, and counting on the facts, as they existed, to support the action.

In most of the States provision is made by statute for bringing a judgment from a justice's court to a court of record on *scire facias* to bind lands. It may have been

Statement of the case.

the plaintiff's object in this case to place himself on a better footing in the District Court than he had in the justice's court; but whatever may have been his object, we think he had a right to bring his suit as he did. The judgment of the District Court is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

THE STATE OF TEXAS v. PAUL BREMOND.

1. Whenever a tax is authorized by law, and no special provision is made as to the source from which the revenue is to be derived, the law implies that the tax shall be levied upon all property subject to general taxation, and collected as other taxes.
2. The legislative power may confer upon local corporations the power to assess taxes for particular specific purposes, and the school directors must be regarded as civil corporations.
3. Irregularities in assessments, when not resulting from fraud, will not render the taxes founded upon such assessments void.
4. The third section of the act of August 13, 1870, requiring the boards of school directors to levy and have collected, when necessary, an *ad valorem* tax on all taxable property of the county, not exceeding one per cent., was in force and applicable to assessments made in 1871.

APPEAL from Harris. Tried below before the Hon. James Masterson.

Suit brought by the State of Texas, suing for the benefit of the school fund of the school district of the county of Harris, to recover the amount claimed to be due on an assessment of $\frac{25}{100}$ of one per cent., for the year 1871, for the purpose of building school houses and maintaining schools in said school district.

The defenses relied on in the court below were: 1. That the county of Harris had never been divided into school districts as required by law. 2. That the body styling itself "the board of school directors of the school district

of Harris county" had no legal existence or authority to levy the tax for which the suit was brought. 3. That no "school district of Harris county" has or could be lawfully created. 4. That the act under which the right to levy and collect the tax sued for was claimed was inoperative and void, because it does not specify any or upon what property the tax should be levied.

The evidence disclosed that Harris county had never been divided into school districts; that there was one board of school directors for the entire county, and that board, on the thirteenth of July, 1871, levied a tax of $\frac{95}{100}$ of one per cent. on the assessment roll of 1871, for the purpose of building school houses and maintaining schools.

Verdict and judgment for appellee.

S. G. Newton, for appellant.

No brief for appellant has reached the hands of the Reporters.

Crosby & Hill, for appellee, file no brief, but refer the court to arguments in other causes involving the same questions.

WALKER, J.—The instructions of the court to the jury in this case are as follows, viz.:

"If from the evidence you find that Harris county was never subdivided into school districts (two or more), and no school directors were, after such subdivision, ever appointed to such school districts so ascertained, then, under the law governing the case, there is no legal board of school directors, and the resolution in evidence is a nullity. If you so find the facts, find for defendant on this branch of the case.

"The section five, under which it is claimed by plaintiff that the alleged tax sought to be collected in this case, is

inoperative, because it does not in itself, or by reference to any other law, designate the subject matter of taxation. The omission is one which the court has no power to supply; but that being a matter for the Legislature, the judiciary, according to its general powers—notably under Section 1, Article 2, of the present State Constitution—is restricted to the law as it is written.

"Before a cause of action upon which suit may be maintained accrues for non-payment of a tax, the person who is to have his property taxed must either be called upon for rendition of his property for taxation, or where he does not render his property for taxation, then the justice of the peace where the property is situated must assess it; and before the sheriff can seize personal property, or before the tax claimed to be due on real estate can be sued for, the board of school directors—legally existing—must in some manner have caused an assessment and valuation of the property of the person against whom the tax is sought to be levied to have been made and placed in the sheriff's hands (under instructions from the Board of Education); until then the citizen is not in default, and is not liable to be sued."

We have had before us a class of cases, involving generally the same questions which are raised in the one under consideration. A great diversity of opinion is found to exist among the Judges of the District Courts; and the profession is also divided in opinion touching the questions raised upon this record. No great changes can ever be effected in government, or in the social order of things, without exciting opposition; and this opposition often provokes itself to rancorous antagonism.

We have repeatedly acknowledged our great indebtedness to the learning and fairness of the profession in almost all cases which have come before us for adjudication; but unfortunately we are admonished that the case

now under consideration belongs to a class of cases, the solution of which has been carried to the arbitrament of political rather than judicial decision. When this becomes the case, none can deny the danger which threatens judicial investigation. The fanaticism of politics is bold to assail the temple of justice.

When the case of Kinney v. Zimpelman was decided, all the questions which are raised upon this record were fully considered, and we do not deem it necessary now to fortify or review the doctrine of that case. The decision of the case at bar is referable thereto; but it is perhaps incumbent upon us again briefly to notice the points assumed in this class of cases by those who object to paying the tax.

It is assumed that the State has not been properly subdivided into school districts; that there has been no special assessment of property to be taxed for school purposes; that the law does not especially designate the property to be taxed; the legal and constitutional existence of the board of school directors is denied—the constitutionality of the school laws, etc., etc.

It may perhaps be said, in distinguished honor of the framers of our Constitution, that no State Constitution makes a broader or more ample provision for universal public education than does that of the State of Texas. It is left to the Legislature, in its wisdom, to carry into effect and develop the fruition of the provision which the Constitution has made, and it could not be expected that a perfect system would result from the initiatory effort in this direction; and that confusion and ambiguity, such as to puzzle the best legal minds, should arise, is not at all anomalous.

Regarding the question as one involving the highest public interest, and feeling at all times the great danger which must arise from a clash between the co-ordinate

branches of the government, we have endeavored, as a court, to divest ourselves of all bias, prejudice and preconceived conviction, and consider these questions not only with a view to their great public importance, but to view them in the clear light of the law as they are affected by sound reasoning and precedent. It is true the action of the Thirteenth Legislature has divested these cases of much of their importance, as great modification has been made in the law; so much so, indeed, that it may be said a new system is now to take the place of the old. But let us recur to some of the objections urged against the school tax, such at least as may be regarded as most formidable.

The act of August 13, 1870, provided that each organized county should constitute a school district. The county courts were made *ex officio* school directors, with power to subdivide their counties into school districts, as might be thought necessary. The act of April 24, 1871, superseded the county courts as school directors, and authorized the supervisors to appoint directors, and subdivide counties into districts. The act of November 29, 1871, does not materially change the act of April 24. We are unable to find wherein these provisions of the law have been violated in a manner to render the collection of the tax illegal. We are abundantly justified by authority in holding that wherever a tax is authorized by law, and no special provision is made as to the source from which the revenue is to be derived, the law implies that the tax shall be levied upon all property subject to general taxation, and collected as other taxes. (See Hale v. The City of Kenosha *et al.*, 29 Wis., 599.)

The main objection to the law under consideration is, that the Legislature has attempted to delegate, without authority of law, the taxing power to the school boards.

In Kinney v. Zimpelman the court refer to the con-

stitutional provision on this subject, which authorizes the Legislature to confer upon local boards of directors what is denominated legislative power; but we deem it unnecessary to resort to this provision of the Constitution to justify the action of the local boards. They do not exercise a legislative power; they pass no law. The tax is levied and collected under an act of the Legislature. It is certainly too late to deny that the legislative power may confer upon local corporations the power to assess taxes for particular specified purposes, and these school directors must be regarded as civil corporations.

In a late work upon municipal corporations by the Hon. John T. Dillon, LL. D., one of the circuit judges of the United States, it is said: "The school district, or the road district, is invested with a corporate character, the better to perform, within and for the locality, its special function, which is indicated by its name. It is but an instrumentality of the State, and the State incorporates it, that it may the more effectually discharge its appointed duty."

In Harris v. School District No. 8, (8 Foster, N. H., 58-61), Judge Bell remarks upon the powers of school districts: "These little corporations have sprung into existence within a few years, and their corporate powers and those of their officers are to be settled by the constructions of the courts upon a succession of crude, unconnected and experimental enactments." It is very doubtful whether the embarrassments of the New Hampshire court, growing out of crude and experimental enactments, could have been greater than those we are contending with. The learned judge further remarks of the school districts of New Hampshire, that they are *quasi* corporations of the most limited powers known to the laws. "They have no powers derived from usage. They have the powers expressly granted to them, and such

implied powers as are necessary to enable them to perform their duties, and no more. Among them is the power to vote money for specified purposes, and the power to appoint committees to carry their votes relative to those purposes into effect. The district may clearly, by their votes for building and repairing school houses, limit the expense to a definite sum, and they may limit the precise repairs or the exact description of the school house to be built, and when this is done, the committee (appointed to carry the votes into effect) cannot bind the district by exceeding these limits. These committees are special agents, without any general powers over the affairs of the district, and their powers are confined to a special purpose, and no inference can be drawn from the general nature of their powers."

Due attention to these plain and simple explanations may serve to divest the question as to how far these boards in our own State are authorized by law to act, of its trouble and confusion, and enable us to determine whether they have or not, in any case, transcended the scope of their authority.

It may be proper here to remark that we do not deem it legitimate or incumbent upon us to inquire as to what influences may have been brought to bear upon these local boards by the Superintendent of Schools, the Supervisors, State Board of Education, or any other authority or power. Their action is not so impeached, except in the arguments of counsel, as to make this a legitimate subject of inquiry. There may be some irregularities in the manner in which the school tax has been assessed, but we do not meet with any which, in our judgment, demands of this court a decision adverse to the collection of the tax.

In the Missouri River, Fort Scott and Gulf Railroad Company v. Morris *et al.*, 7 Kansas, 210, the Supreme

Court decide that irregularities in the assessments made by the county clerks, as a board or acting separately, will not render the taxes founded upon such assessment void. We take it that this can be true only in the absence of fraud; and we here say unequivocally that if we were satisfied that there has been fraud practiced in any of the cases before us, touching the assessment or collection, we should not hesitate for one moment to set it aside.

Finally, it is insisted that the provision of the law under which the one per cent. school tax has been assessed was repealed by a subsequent statute. In Kinney v. Zimpelman we gave two reasons, which we still consider good, for holding that the law was not repealed; first, that the law especially excepts from repeal all special acts, and this we regard as a special law; and second, we do not believe it could have been the intention of the Legislature to repeal the law by an act which was numbered on the calendar of the Senate as number 99, and which contained the sections numbers 8 and 30, as they afterwards became a part of the law. This bill was introduced in the Senate several days before the act which it is claimed to have repealed. The latter was numbered 166. Let us suppose that both the acts were drafted by the same individual. Is it possible to suppose that he would have intended in a bill introduced to-day to repeal the provisions of a bill which he intended to introduce the following week? Or suppose the two bills are the separate product of different minds, is it reasonable to suppose that A. would introduce his bill to-day for the purpose of repealing the provisions of a bill to be introduced by B. a week hence? This would be absurd, even upon the supposition that A. knew in advance what would be the provisions of B.'s bill; for by all precedent A. would first endeavor to defeat B.'s bill on its merits, and if he should fail he might then introduce a subse-

quent bill in hostility to B.'s bill. But we dismiss the further consideration of this question.

We have tried to exclude from the consideration of these cases all ultra or extraneous questions. But we cannot dismiss from our minds the fact that the State is indebted to a class of most meritorious and deserving persons, a majority of whom are ladies, who have employed their time in teaching the youth of the State under the promise and expectation of being paid out of the fund which has been restrained by these injunctions. Many of these ladies have absolutely suffered from want of their salaries, so withheld from them. We said this is the debt of the State; in one sense it is, and the honor of every citizen is pledged to its payment; but in a more accurate sense it is only the debt of certain individuals, corporations and men of means. Most of the counties, and to the honor of the people be it said by far the greater number of the citizens of the State, have paid their proportionate shares of the tax. There is then, beyond the legal obligation, a strong moral obligation resting upon every property-holder to pay this tax.

It is proper to remark that we are fully persuaded that this contest has grown out of reasonable and formidable objections to the legality of the tax, and we are far from holding those who have refused to pay it as enemies to society and good government; but we have weighed the arguments *pro* and *con*, and have deliberately determined that the tax is legal and ought to be paid. But we shall rejoice if it be found that the great need of public education is provided for by laws less cumbersome, crude and ambiguous than those which we have been compelled to consider.

Taking what we have herein said in connection with our opinion in Kinney v. Zimpelman, we have said all that we think it incumbent to say in an opinion disposing of

nearly all the tax cases. There are yet several cases undecided, involving other important questions which have not been herein considered; but all those cases involving the principles involved in the case now under consideration and in Kinney v. Zimpelman will be regarded as herein decided.

This case is reversed and remanded.

REVERSED AND REMANDED.

H. B. MUNNERLYN v. C. B. ALEXANDER.

1. The owner of property seized under attachment wrongfully sued out, is entitled to recover as actual damages the value of the use of the property while it is withheld from his control. His right to such recovery is not affected by the fact that the property had been replevied, and remained under control of his co-defendant, who had no right to the same.
2. In determining whether the pleading forms a sufficient basis for recovery, the original plea may be considered in connection with subsequent amendments; when neither, taken separately, is good, a demurrer will not be sustained, if considered together they state a cause of action.

APPEAL from Madison. Tried below before the Hon. James R. Burnett.

In September, 1865, appellant sued appellee, with Syddleton Smith and G. W. Turvin, for $1500, claimed to be due on a note. He procured an attachment against the property of defendants, and had the same levied on the property mentioned in the opinion. Thus far the proceedings seem to have been conducted by the appellant in person, and offered another instance of the folly of men attempting to transact business which they do not understand. The petition declared on a note for $1500, while the affidavit for attachment claimed an indebtedness of $1540. At the March term, 1866, appellant seems for the

first time to have been represented by counsel, who amended his petition, and described correctly the note sued on as a note for $1586.61. The sheriff, at the September term, 1866, amended his return, which showed that the levy had been made nearly a year before, and described the property seized as the property of Alexander, with the exception of a few articles which do not figure in the subsequent proceedings. On the thirtieth day of September, 1865, Syddleton Smith replevied all the property seized, including the property of Alexander.

On the sixth of September, 1866, Alexander filed his plea in reconvention against plaintiff, in which he alleged that the attachment was wrongfully sued out, and amended his original answer, which claimed a recovery only against the plaintiff in attachment, by declaring on the attachment bond, and asked a judgment against the principal and securities. The attachment was quashed on the sixth of September, 1866. The case was tried at the December term, 1871; verdict and judgment for Munnerlyn for amount of his note with interest, and against him in favor of Alexander for $2865.85 actual damages, from which plaintiff appealed. The evidence disclosed that Smith attempted, after replevying the property, to claim the same as his own.

Baker & Maxey, for appellant, cited Harrison v. Harwood, 31 Texas, 657; Drake on Attachments, § 156; Culbertson v. Cabeen, 29 Texas, 255; 2 Greenleaf on Evidence, § 453.

L. A. Abercrombie, for appellee, cited Walcott v. Hendricks, 6 Texas, 419; Culbertson v. Cabeen, 29 Texas, 255; Brown's Administrator v. Tyler, 34 Texas, 168; Drake on Attachments, §§ 175, 177, 178; Robins' Administrator v. Waller, 2 Texas, 130; Pridgen v. Strickland, 8 Texas, 427; Horton v. Reynolds, 8 Texas, 284.

Opinion of the Court.

WALKER, J.—The appellant sued out an attachment in September, 1865, against the appellee and Smith & Turvin. Most of the property levied on appears to have belonged to Alexander; but by some means or other, Smith, his co-defendant, replevied the property, and kept it in possession for nearly a year. The property consisted of seven wagons, valued at $500; twenty-nine and a half yoke of oxen, valued at $725; and three horses, valued at $200, and perhaps some other property. In the course of proceedings, the attachments were quashed. The appellee brought a cross-action for damages, the petition declares, on a joint and several note, for $1500. The affidavit does not correspond with the note, but the plaintiff was permitted to amend the irregularities in his proceedings.

It is first insisted on as error, that the court overruled the plaintiff's exceptions to Alexander's original answer and plea in reconvention; and it will be noticed that the appellee did not declare in his original plea, on the attachment bond; but he averred the wrongful suing out of the attachment, and claimed damages. On this plea an issue was joined, and the plaintiffs set up new matter in evidence. Years elapsed before the pleadings were settled and a trial had.

After the replication was filed the appellee filed an amended plea declaring on the attachment bond; and it would seem from the order of pleading that the appellee's amended plea and answer had been filed before the exceptions were filed to his original plea; there was certainly then no necessity for an exception, as the amended plea did declare on the attachment bond.

The original and amended plea, taken together, were sufficient, and we do not think the court erred in overruling the exceptions.

The appellee then had his cause of action sufficiently stated against the plaintiff and his securities.

The second error assigned is to the charge of the court, but we are unable to find any exceptions taken to the charge. The error complained of probably consists in that part of the charge which instructed the jury that the plaintiff was liable, in actual damages, for the use of the property while it was withheld from the possession of the appellee. But upon proof that the attachment was wrongfully sued out, we are of opinion the jury had a right to consider and allow reasonable compensation at least to the appellee for the damage sustained by being deprived of the use of his property. (See Walcott v. Hendricks, 6 Texas, 419; Culbertson v. Cabeen, 29 Texas, 255; Harrison v. Harwood, 31 Texas, 657; Brown's Adm'r v. Tyler, 34 Texas, 168.)

Upon careful examination of all the assignments for error, we do not think there is cause to reverse this judgment. The verdict of the jury does not give the appellee a larger amount of damages than the testimony authorized, though we must confess it is rather a strange result that a plaintiff should bring his action on a promissory note for $1500, and so manage his case as to get a judgment against himself for near $3000; nevertheless, the jury are the better judges of this matter, and we affirm the judgment.

AFFIRMED.

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J. M. BASS v. J. M. HAYS.

1. A motion for new trial not acted on is discharged by the adjournment of the court.
2. At the close of the term the District Court loses all jurisdiction over its final judgments, and has no power to vacate the same save by original bill for that purpose.
3. An order of the District Court vacating a final judgment rendered in the same case at a former term, will be set aside by the Supreme Court on appeal by the party injured.

Argument for the appellant.

APPEAL from Lamar. Tried below before the Hon. A. H. Latimer.

Suit was filed by appellant against appellee to the November term, 1870. Service was had and judgment by default; writ of inquiry executed and final judgment rendered November 27, 1870, for appellant.

A motion for new trial was filed and amended at same term, but not acted upon by the court.

At the March term, 1871, another motion, or amended motion, for new trial was filed, but not acted upon until, at the July term, 1871, the court, upon said motions, granted a new trial.

At the March term, 1872, the appellant filed his motion to set aside the order of said court, rendered in said cause on the eighteenth of August, 1871, which said order set aside the judgment by default in favor of plaintiff against defendant, rendered during the November term, 1870, and granted the defendant a new trial, because he says "that the court had no jurisdiction of said case in the way attempted; it had no right to disturb its own decrees at a former term, and said order granting the new trial is, for this reason, a nullity."

This motion was by the court overruled, to which the plaintiff excepted and gave notice of appeal to the Supreme Court.

Bennett & Ballinger, and *S. B. Maxey*, for appellant. We insist that the court had no jurisdiction at that time to hear and determine the motion for new trial, and that its whole action after the close of the November term, 1870, at which the judgment in favor of plaintiff (appellant) was rendered, is without jurisdiction, in violation of the vested rights of appellant, null and void. (McKean v. Ziller, 9 Texas, 59; Laird v. The State, 15

Texas, 317; Bullock v. Ballew, 9 Texas, 500; Wilcox v. The State, 31 Texas, 588.)

It is conceded that a court may grant a new trial after the close of the term, but the law places close restrictions upon the exercise of this power. It can only be done upon an original proceeding had for the purpose, and then only upon the clearest showing.

It is not pretended that the defendant was debarred by any act of plaintiff from making his defense, nor does he even set up that he had employed counsel (though that would make no difference), but simply that he had talked to a lawyer whom he had employed in other cases, and supposed he would have filed an answer, and that he did not suppose the case would have been reached so soon. All this would not have availed had he proceeded regularly. (Scrivner v. Malone, 30 Texas, 775.) Certainly it cannot possibly avail when he has wholly disregarded the mode pointed out by the law for obtaining a new trial after the close of the term at which judgment was rendered. "In applications for new trial at a term of the court subsequent to the trial term at which judgment is obtained, the proceeding is in the nature of an original suit in equity. Whatever, therefore, would be the subject of equitable cognizance in any case would be of like cognizance in a suit for a new trial." (Davis v. Terry, 33 Texas, 426.) "The judgment becomes a vested right which can only be divested by a direct proceeding, and for sufficient legal cause, in some of the modes known to the law. The maxim of the civil law, *res judicata pro veritate accipitur*, is recognized and applied by our own." (Goss v. McClaren, 17 Texas, 115; see also Caperton v. Wanslow, 18 Texas, 133; Fisk v. Miller, 20 Texas, 577; Vardeman v. Edwards, 21 Texas, 739.)

G. W. Wright, for appellee.

Opinion of the Court.

OGDEN, J.—At the November term, 1870, of the District Court, appellant obtained a judgment by default against the appellee. A motion for a new trial was filed at that term, but not acted upon by the court. At a subsequent term another motion for a new trial was filed, and this motion also was not acted upon during the term at which it was filed, but at the following term an amended motion was filed and acted upon by the court, and a new trial awarded. At a subsequent term of the court the plaintiff moved the court to set aside the order granting a new trial, and to award execution on the original judgment, which was overruled, and from this judgment of the court an appeal has been taken. This court has frequently decided that the exercise of a legal discretion by the District Court in granting new trials was not a subject for revision by an appellate court. But this rule should be confined to the legitimate exercise of that discretion, and while the court has jurisdiction of the subject matter and the parties at interest.

The statute provides that motions for new trials shall be made within two days after the rendition of the verdict, and that all motions for new trials shall be determined at the term of the court at which such motion shall be made. In McKeen v. Ziller, 9 Texas, 58, this court decided that "the mandate of the law is peremptory and must be obeyed, and that at the end of the term the motion, not having been acted on, was discharged by operation of law." This decision has been followed by this court without a known exception, and must now be considered as the established law of the State.

After the close of the term the court loses all jurisdiction over its final judgments, and has no power to vacate the same, excepting by an original proceeding for that purpose, by petition or bill, setting forth sufficient equita-

ble grounds, with citation to the opposite party, as in other original suits.

The case of McKeen v. Ziller is quite similar to the one at bar, and is decisive of the law of this cause. We therefore adopt the language of the court in that case, in deciding that "the court erred in refusing to set aside the proceedings subsequent to the judgment, and to award execution; that the judgment be therefore reversed, and such judgment be rendered as the court below ought to have rendered."

REVERSED AND REFORMED.

J. F. STROOP v. J. R. MCKENZIE.

1. In a suit upon a contract to deliver a given quantity of lumber, it is necessary to allege and prove the value of the property not delivered.
2. All the parties signing an obligation are principals, unless it appear otherwise, or it be shown by the express understanding of all the parties to the contract that the relation of principal and surety existed between the makers of the instrument.

APPEAL from Johnson. Tried below before the Hon. Charles Soward.

J. R. McKenzie, executor of Wm. Balch, sued Abernathy & Jenkins and J. F. Stroop on a written obligation as follows, attached to a bill of lumber:

"Forty days after date we promise to deliver to Wm. Balch, at his residence, five thousand feet of pine lumber, in accordance with the above bill, for value received of him, this June 1, 1869.

"ABERNATHY & JENKINS.
"J. F. STROOP."

The petition allowed a credit of 1500 feet, and alleged the reasonable value of the lumber at the date of the obligation, and of filing the suit, at five dollars coin per

thousand; that the lumber had not been delivered, and a money judgment was asked.

The defendant, Stroop, answered by general denial and under oath that he only signed the obligation as surety for Abernathy & Jenkins, and that the plaintiff has been negligent and has not used the diligence that the law contemplates.

The plaintiff, by amendment, alleged that Abernathy & Jenkins were insolvent, and dismissed as to them.

Verdict and judgment for plaintiff against Stroop, the appellant, for $201.27.

The statement of facts did not show that any value of the plank had been proven.

Motion for new trial was overruled.

J. C. Rushing, for appellant.

Chandler, Carleton & Robertson, for appellee.—Appellant alleges that the statement of facts does not show that any value of the lumber was proven. This we regard as really the only point in his case, and, even were this true, we think he has utterly failed to place himself in a position to take advantage of it; and upon this point—

1. There are no charges of the court in the record, and we infer that appellant asked none.

2. His motion for new trial does not allege that the verdict was contrary either to law or evidence.

3. The verdict of the jury was based upon the evidence before them, of which they were the best judges, and nowhere, except in his brief, does he complain of the failure in the evidence to sustain the plaintiff's demand.

4. His assignment of errors, after the most strained and liberal construction, cannot be brought to cover such error, if it really exists. Will the court look into anything not covered by the assignment of errors? It has declared repeatedly that it will not.

A party is concluded by his assignment of errors, and the court will not look beyond. (Steen v. The State, 27 Texas, 88.)

All errors not specially assigned are regarded as waived. (Pas. Dig., Art. 2940; Hollingsworth v. Holshousen, 17 Texas, 47; Scott v. The State, 31 Texas, 410; Geiselman v. Brown, 30 Texas, 761; Garner v. Custer, 28 Texas, 184.)

We think, therefore, that the court cannot consider this question, as it is only raised in the brief, and is not a defect going to the foundation of the action.

OGDEN, J.—There is error in the judgment in this cause, which will require a reversal of the same. The note sued on was payable in pine lumber, and the judgment is for dollars, without any proof of the value of the lumber.

It may be true that a note or other obligation, payable in property of any kind, upon default of payment when due, may be collected in dollars; but in order to entitle a party to a moneyed judgment, he must allege and prove, not only a default in payment, according to the terms of the obligation, but also the value of the property promised to be paid or delivered, and in default of such allegation and proof, a judgment for money will be set aside, on an appeal.

We think the court did not err in its rulings upon the plea of suretyship. The note sued on is a joint note, and signed by Abernathy, Jenkins and Stroop; upon the face of the note they are all principals, and are equally liable in the first instance as such, and the payee had a right to look to them, and all of them, for the payment of the note. Neither party to that note can escape responsibility as principal, without alleging and proving that the payee or holder thereof had full knowledge of

the fact; that he signed the same as security, and not as principal; and that the payee or holder consented to take the note, holding him as security only.

Upon the allegation that Abernathy and Jenkins were insolvent, it was not error in the plaintiff dismissing the suit as to them, not served, and prosecuting his suit to judgment as to the other. But for the error first noticed the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

T. H. McMAHAN ET AL. v. W. D. ALEXANDER.

1. An attempt by a clerk of a consignee to sell property consigned to his principal, to a party, for use of said party and the clerk making the sale, is fraudulent, and such contract would be void as against the consignors.
2. Even if the clerk had authority to sell, he could not sell to himself, either directly, or indirectly to another for his use.

APPEAL from Galveston. Tried below before the Hon. G. E. Mann.

This is a suit by appellee against McMahan & Gilbert and Morgan McMories for the one-half the proceeds of sale of fifty-eight bales of cotton consigned to McMahan & Gilbert and by them sold.

The intervenors claimed the whole of the consignment, less the necessary expenses and charges.

McMahan & Gilbert seem to occupy the position of stakeholders, and rendered an account of the sales of the cotton and professed a willingness to abide the decision of the court as to the ownership of the cotton.

The opinion of the court gives the facts upon which Alexander based his claim, and what McMories did in the transaction.

The court refused to charge the jury (at instance of the intervenors):

"An agent employed to sell cannot become the purchaser from himself for himself, nor as the agent of another; and if you are satisfied that McMories sold the cotton as the agent of McMahan & Gilbert, and was interested in the purchase for himself, or as the agent of another, such sale was void, and did not change ownership or pass title to the cotton.

"If from the evidence the jury believe that the fifty-eight bales of cotton, mentioned in plaintiff's petition, were purchased from McMories by Alexander & McMories jointly, or by either of them, for account of both, and that McMories was to sell the same, and divide the proceeds betwixt them, they were partners as to that transaction, and the cotton thus acquired was partnership property, such purchase and sale did not pass any title to either of them, and you will find against the plaintiff."

Verdict for Alexander for one-half of the cotton against the intervenors and defendants, upon which judgment was rendered. The defendants and intervenors appealed.

Burroughs & Hicks, for appellants, cited Story on Agency, §§ 224, 225, 226; 2 Kent's Com., 309, 313, 314, 315, 381, 382; 11 Kinney's Law Compendium, 114; 11 Howard, 209, Warren *et al.* v. Martin; 28 Texas, 169, Smith v. Sublett; Story on Contracts, 224; Story on Agency, §§ 34, 367; 1 Parsons on Contracts, 82, 83; 1 Parsons on Contracts, 66, 67, 68, 69; 1 Parsons on Contracts, 65, 41, 48, 89; Hill on Trustees, 209, 790, 791, 792, 807; 18 Texas, 824, Commercial Bank v. Jones; 32 Pennsylvania, 340, Pittsburg R. R. Co. v. Gazrau; Angell & Ames on Corporations, § 517; Chitty on Contracts, 17, 221, 671, 657; Story on Bailments, § 299; 24 Wendell, 178; 3 Parsons on Contracts, 238; Gow on Partnership,

3, 5, 82, 86, 147; 2 Kent's Com., 647, 657, 742; Hilliard on Torts, 101, 102, 107; Paschal's Digest, Arts. 2421, 1809, 1813, 1814, 1820, 2426, 2429, 1476; 30 Texas, 758, State v. Wallace; 2 Bishop's Crim. Law., § 360; 10 Wendell, 97; 3 Cowen, 425, 433.

McElmore & Hume, for appellee, cited 1 Parsons on Contracts, 72, 80; Judson v. Sturges, 5 Day, 556; 3 Caines, 226; 1 Story, 43.

WALKER, J. About the month of April, 1865, W. A. Furgurson, acting for himself and some of his neighbors, who, together, owned sixty bales of cotton, shipped the same, through W. D. Alexander, a forwarding merchant doing business at Beaumont, to T. H. McMahan & Co., the appellants, who were then doing business at the city of Houston, and appear to have been cotton brokers.

Alexander probably made some advances on the cotton, to reimburse himself for which he drew upon the appellants, forwarding his draft through one McKeen.

McKeen presented the draft at the business house of the appellants, where he found one Morgan McMories, who was the clerk of the appellants. This clerk appears to have been left in charge of the house, the partners being absent. He refused to honor the draft, as he says, because the house was not in funds and the account was overcharged $125, but promised McKeen that he would hold the cotton subject to Alexander's claim. Sometime afterwards Alexander came to Houston. The cotton had been repacked, as this clerk says, and had lost two bales in the operation. Alexander and McMories then made a contract, which is witnessed by the following instrument of writing:

"HOUSTON, May 27, '65.

"I hold jointly with W. D. Alexander fifty-eight bales of cotton, marked as follows: Z R 15, W 19, W A F 15,

R 8, N 1; which, when sold, is to be accounted for equally with him."

By this arrangement this clerk secured to himself one-half of fifty-eight bales of cotton, besides which he says Alexander gave him $114 over and above his charges for the other half of the cotton.

Afterwards it seems that he paid Furgurson $138 as the entire amount due from the fifty-eight bales of cotton. Thus it will be seen that this clerk of the appellants secured to himself, as he supposed, twenty-nine bales of cotton for just $24, for that is all that he was out of pocket. This is a sufficient statement of this case.

The charge of the court utterly fails to lay down the law of the case to the jury. McMories, as the agent of the appellants, may or may not have been authorized to make sale of the cotton to any person competent to buy it, but he could not be both buyer and seller, nor could he sell it to one buying jointly with himself.

McMahan & Co. repudiated the transaction, as well they might. The contract between McMories and Alexander is utterly void, and the facts as testified to by McMories himself are such as to raise the indubitable presumption of fraud. But, if no fraud had been intended, the contract is void for the reason assigned.

Alexander, the appellee, has no right to one cent more of the money arising from the sale of this cotton than will reimburse him for just charges and expenses. The net proceeds of the cotton belong, both in law and equity, to the intervenors.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Statement of the case.

M. GREGG v. W. C. ENGLISH.

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1. Where time is not of the essence of the contract for sale of land, the mere failure to pay the purchase money will not be held a repudiation of the contract, so as to authorize suit by the vendor for the recovery of the land.
2. The vendor in an executory contract for sale of land should tender a deed and make demand of the purchase money before suing for the land against his vendee.

APPEAL from Fannin. Tried below before the Hon. W. H. Andrews.

On the ninth of May, 1870, Milton Gregg filed his suit against W. C. English in trespass to try title to six hundred and forty acres, the headright of plaintiff. The defendant plead purchase from the plaintiff of two tracts of land, parts of the tract sued for, one of one hundred and seventy-five acres (the consideration for which he alleged and proved had been received by the plaintiff), the other of three hundred and forty-seven acres, for which he held the title bond of the plaintiff of date of thirtieth of May, 1855. Defendant tendered the balance of the purchase money upon the larger tract into court, and, excusing his delay, plead that no title deed had been tendered him by the plaintiff. The plaintiff, in replication, alleged that defendant had repudiated the contract of purchase.

On the trial plaintiff showed patent to the land, which included the land in controversy.

The defendant read the bonds, one for one hundred and seventy-five acres and the other for three hundred and forty-seven acres, the condition in which was: "Now, if I make, or cause to be made, a good and lawful title, so soon as the government makes a title to the same, then this obligation to be null and void, otherwise to stand in full force and effect."

The defendant tendered in court the amount due on the notes for the purchase money, said notes being of same date with the title bond for the 347 acres. The plaintiff had never tendered to his vendee a deed for the land. Judgment for defendant for the land, and plaintiff appealed.

Hare & Bledsoe, for appellant.—In a suit for the rescision of a contract, the plaintiff must be willing to place the defendant in *statué quo*, but not so where the contract has already been put to an end by the disaffirmance or repudiation of it by defendant. It is not now an open question that whenever the vendee disaffirms his contract he becomes a trespasser, and the vendor is then entitled to bring his action of ejectment. (Browning v. Estes, 3 Texas, 474; and same case, 11 Texas, 242, and cases there cited; Todd v. Caldwell, 10 Ib., 236.)

In a case where the vendee simply fails to pay the purchase money, or the suit is for a rescision of the contract, it would be necessary for the vendor to execute a deed and tender it, and demand the payment of the purchase money. But this is not necessary where the contract has been disaffirmed or repudiated by the vendee. (Fullerton v. Doyle, 18 Texas, 3; and Walker v. Emerson, 20 Ib., 711.) Gregg had done all that he was required to do in this case. He had written to English that he was in a condition to perform his part of the contract; that the patent had been obtained, and for English to pay the money, which English not only refused to do, but declared that he never intended to pay him anything, and besides this, threatened him with a lawsuit if he refused to make him a title without any further payment.

The court below seems not to have made a proper distinction between those cases where notice to quit the possession was necessary and where the vendee himself had

forfeited his right to any notice or tender of deed or demand for the purchase money. (Secrest v. Jones, 21 Texas, 132; Gregg v. Von Phul, 1 Wallace, 282; Baker v. Lessee of Giddings, 16 Ohio, 489.) "In an executory contract of purchase, the possession is originally rightful, and it may be that until the party in possession is called upon to restore it he cannot be ejected without a demand or notice to quit. But the vendee can forfeit his right of possession, and if he fails to comply with the terms of the sale, his possession afterwards is tortious, and there is an immediate right of action against him. It would be an idle ceremony to demand possession when to a previous demand for the money due on the contract of purchase the vendee refused to respond. This refusal, unaccompanied by any promise to pay the money at a future day, was equivalent to a direct notice to the vendor that the vendee declined to execute the contract." (See cases above cited.)

The defendant seems to have rather a strange idea of dependent and independent covenants, where the notes for the sale of land are payable at a fixed day, and the vendor agrees to make title at some future day. He seems to think that he would be relieved from the payment of the purchase money until the latter event had transpired. In the case of Taul v. Bradford, 20 Texas, 263, the court says, "That a covenant, on the part of the vendee, to pay the purchase money at a particular date, and of the vendor to convey at some indefinite period, as for instance after a patent is obtained from the government, are not dependent upon each other, and the purchaser must pay the money when due and rely upon the covenant of the agreement for his remedy." This explains what is meant by independent agreements, and is believed to be in direct conflict with the charge given by the court.

In the case of Scarborough v. Arrant, 25 Texas, 129,

which is relied on by the defendant, there was a mere failure to pay the purchase money, and no demand had been made, and no act had been done by the vendee indicating an abandonment or disaffirmance of the contract. It is submitted that in that case, if the vendee had written a letter to his vendor, that he "did not aim to pay" any of the purchase money after a demand on the part of the vendor, and had set up title in himself, or, in other words, had been guilty of one-half of the acts of repudiation of his contract evinced by English in the case at bar, the court would have withheld any relief from him. The notes in this case were due at a certain day. One of them stipulated that the consideration could be discharged in young cattle. But the defendant having let the day of payment pass without performance on his part, or an attempt to do so, it became a moneyed demand, and Gregg was under no obligation to receive the payment of the note in anything else than money. (2 Parsons on Contracts, 1 Ed., 163; Hemming v. Zimmerchitte, 4 Texas, 159; Baker v. Todd, 6 Ib., 273.) And the fact that Gregg did not receive cattle in discharge of the note after due, was no justification to English for not paying the money.

As to whether time was of the essence of the contract, relates only to those cases in which the vendee failed to pay the purchase money. It being or not being of the essence of the contract at the making of the contract, can have nothing to do with a case in which the contract was repudiated by him. But even if it were admitted that the determination of that question was essential in this case, we would only have to refer to the doctrine laid down in the case of Edwards v. Atkinson, 14 Texas, 377 and 378, and apply it to the statement of facts in this case, for a proper solution of it. In that case the court say: "Where default is made, payment of interest on the

purchase money would be comparatively but a slight compensation to the vendor for the loss of the increased value in the land, and of the use of the money in the purchase of other lands or property which is augmenting in value or price." The remarks of the learned judge in that case, with reference to the rapidly increasing value of land in this State, apply with peculiar force to the case at bar. According to the statement of English, he only paid sixty dollars, and the two notes for the 347 acres of land, which, from the testimony of all the witnesses, was worth, at the time of trial, from five to eight dollars per acre. The sum tendered into court by English in this case was but a small compensation for the use of the money during the time which had elapsed since it was due, or for the land, considering its increased value. The attention of the court is also called to the fact that even after the suit was instituted, it was about two years before the money was tendered into court, and then tendered in United States currency, which was not equal in value to the kind of money in the original contract.

While we are free to admit that the money tendered is sufficient to pay a specie debt in a court of law, but when English, by his cross-action, seeks specific performance in a court of equity, he cannot be allowed to take advantage of legal technicalities, but must do conscientiously what he had contracted to do. He must be "ready, desirous, prompt and eager to perform the contract." (Story's Eq. Jur., § 776.) Not some other contract, but the one in question, according to the principles of honesty and fair dealing. In courts of equity legal technicalities and advantages are regarded with no favor. The question is, when a party seeks relief upon equitable principles he must show to the court that he was or is willing to do all that was required of him by his contract, according to the true intention and spirit of it at the time it was made. It

is believed also that the court erred in permitting any proof of tender, as the defendant had plead the general denial and relied on it. The effect of a plea of tender is too well understood to merit any comment. (Sayles' Pleading, Sec. 76; 2 Greenl. Ev., Sec. 600; Brock v. Jones, 16 Texas, 467.) It is true under our system the defendant may plead as many separate defenses as he thinks fit, so they are filed in due order of pleading. This rule relates to those defenses which tend to defeat the action of the plaintiff, and not to such as confess it. (Hillebrant v. Booth, 7 Texas, 500; Smith v. Sublett, 28 Id., 163.)

We believe under the proof that the plaintiff was entitled to a judgment for the 347 acres of land. We would therefore ask that the court here reverse and reform the judgment of the court below, so that the ends of justice be attained and further litigation in regard to this tract of land cease.

R. W. Campbell, for appellee.—Is time of the essence of the contract? Time is only of the essence of the contract when it is made so by the stipulations of the parties.

In Edwards v. Atkinson, 14 Texas, 373, is an instance of a bond for title, in which time was of the essence of the contract. Is it similar to this? The bond in this case reads, "Now if I make or cause to be made a good and lawful title so soon as the government makes a title to the same." The condition was, to make title when the land was patented. In that case, time was of the essence of the contract; in this case it is not. In the case above cited the vendor had to perform his part strictly, because he had so stipulated to do. There his title was dependent upon his performance. In this case there was no such agreement. Gregg bound himself in the penal sum of eight hundred dollars to make title as

soon as he obtained one from the State. Was it dependent upon the payment of the purchase money? Not at all; nothing was said about the money, nothing was said about the payment in the bond. It is argued that the notes and bonds form part of the same contract, and must be construed together. This is true in some cases, and for some purposes. In this case it proves too much for appellant; the notes fell due in 1855 and 1856, and patent issued in 1862. Suppose that English, in 1856, had paid the notes and sued Gregg for the penalty of the bond. He could not have enforced it, because no patent had been obtained, and the courts would have allowed him a reasonable time to get a patent.

Then, taking the bond and the notes as parts of the same contract, here would have been one part that could be enforced and another part that could not be enforced at the same time, which proves that the court below was correct in the charge, *i. e.*, that the notes and the bond for the title contained independent obligations. The obligation of the notes was to pay at their maturity; the obligation of the bond was to make a deed when the patent was obtained. As the judge below correctly observed in his charge, English could not, in a suit against Gregg, have enforced specific performance without performing his part, because before he could ask equity he must do equity; and in a suit of Gregg v. English the same rule holds true. Nothing short of a total and continued abandonment on the part of English would enable Gregg to rescind, and then only after Gregg had offered to do all that law or equity demanded at his hands.

There are, as before remarked, two classes of contracts for the sale of land, when bonds for title are given. One is where time is of the essence of the contract, and the other is where time is not of the essence of the contract. An example of the first kind is in Edwards v. Atkinson,

14 Texas, 373, cited by appellant. There the consideration of the contract was that the vendee would, until the faithful performance of the agreement according to the letter and terms thereof, consider himself rentor or lessee of the vendor, covenanting, in case of his failure to comply faithfully with the agreement, according to the true spirit and meaning thereof, to deliver up the land, with all the improvements thereon, to the vendor, without charge, let or hindrance of any kind whatsoever, at the expiration of three years, and lose what money he had paid and work he had already done, etc. In this case, by the stipulation of the parties, the vendor had no rights unless he performed his part of the contract to the letter, and it is generally true that when time is of the essence of the contract, strict performance is required, and the court will note the fact that nearly all of the cases cited by appellant are of this character. The present case at bar is as strong an example as could possibly be given where time is not of the essence of the contract. In Scarborough v. Arrant, 25 Texas, 131, the court held that time was not of the essence of the contract, although the condition was that title should be made upon the payment of the money. In the case at bar the making of the title was contingent upon Gregg obtaining patent. Nor do I presume that it will be asserted by appellant that time was originally of the essence of the contract. Then, if time was not originally of the essence of the contract, under what circumstance could Gregg treat the contract as abandoned, or could he do so at all? If he could do so at all, it would only be upon the total and continued repudiation of the contract by English. Mere failure to perform is not sufficient. Where there is any stipulation that the contract shall become null and void upon default, courts of equity will look to the substance and not to the form. (Primm v. Barton, 18 Texas, 222.) Nor will the

court construe the contract so as to forfeit the equitable interest, unless clearly indicated by the agreement of the parties. (Hill v. Still, 19 Texas, 84.) At law, when time is of the essence of the contract, or where the contract consists of dependant covenants, strict performance is required, but not so in equity. Equity dispenses with that which would make compliance with what the law requires oppressive, and the failure of one party to perform does not put an end to the contract so as to make it void. It gives the other party the right to rescind or waive the default and continue the contract, and when the right has been exercised it places the rights of the parties on a new basis. (Scarborough v. Arrant, 25 Texas, 134.) If the vendee repudiates his contract, the vendor can, by offering to perform his part, and on the continued refusal of the vendee, have the contract rescinded. And here let us inquire, what must the vendor do before he can rescind?

First. He must demand payment and give notice of his intention to rescind, upon refusal. (Scarborough v. Arrant, 25 Texas, 134; Secrest v. Jones, 21 Texas, 121; Hill v. Still, 19 Texas, 76.)

Second. He must tender deed. (2 Hilliard on Vendors, 71, *et seq.*; 1 Hilliard on Vendors, p. 443, Secs. 40, 41, pp. 183, 33; Perry v. Rice, 10 Texas, 367; Walling v. Kennard, Ib., 511.)

Third. When a part of the purchase money has been paid, the vendor must return it before he can rescind. (Thomas v. Benton, 25 Texas Sup., 321.)

The plaintiff in this case never even demanded payment in the proper manner. The only evidence is that Gregg wrote English a letter in 1862, but it could hardly be expected that English would travel all the way to Gregg, in Titus county, to make a payment when he did not know whether Gregg would make him a deed to the land. This,

I suggest, was no such demand as the law requires. He should have presented the notes and demanded the money, and he should have tendered a deed to the land at the same time. Unless he tendered a deed, English had a perfect right to refuse to pay the notes, if they had been presented. (Perry v. Rice, 10 Texas, 367, above cited.)

WALKER, J.—We think the verdict and judgment in this case right upon every principle of law and equity. Gregg was in no condition to avoid his contract with English.

It does not appear that time was of the essence of the contract. No doubt he could have brought suit and recovered on the notes at their maturity, but the time fixed for making the deed was indefinite.

The deed was to be made after the patent issued, but the precise time in which it was to be made does not appear to have been fixed by the parties.

Gregg should at least have tendered a deed before he could rescind the contract.

English having tendered the purchase money into court, was entitled to specific performance of the contract.

The judgment of the District Court is therefore affirmed.

AFFIRMED.

JOHN ADRIANCE, ADM'R, v. W. E. CREWS.

1. A receipt purporting to be a settlement between parties is conclusive on them, unless it be shown that it was obtained by fraud, or under a mistake, or upon some condition.
2. It is error to submit to the jury the question whether such receipt be final in absence of testimony of fraud or mistake, or that the receipt was only conditional.

3. An administrator made a settlement with a creditor of the estate by paying a *pro rata* upon the claim, and taking a receipt in full. Such settlement would bind the creditor, in absence of fraud, mistake, or of evidence that it was conditional.
4. If a creditor is induced by the misrepresentations of an *heir* to compromise his claim with the administrator for a less sum, his remedy would be against such heir. His interest is sufficient consideration to bind him to make good his representations.

APPEAL from Brazoria. Tried below before the Hon. A. P. McCormick.

On the twentieth of June, 1871, Crews brought suit against Adriance, as administrator of the estate of Patton, in the District Court of Brazoria, for the recovery of the sum of $2672.35, alleged to be due him for services rendered the estate of Patton as overseer for the years 1861 to 1865 inclusive, and interest. He filed with his petition an account for that amount in currency, sworn to, presented to said administrator and by him rejected. The petition alleges that Adriance was carrying on a plantation under the order of the county court, that an overseer was necessary, and that Adriance employed him and agreed to pay him $800 a year.

Adriance, on the tenth of October, 1871, filed a general demurrer and general denial, and on the seventeenth of January, 1872, an amended answer, in which he set up that he had fully paid and discharged his indebtedness to Crews, and that Crews had receipted to him for the same. The receipt of Crews is set out in the opinion.

He answered further, that in July, 1869, in his exhibit and account, as administrator, with the county court, he included said receipt and claim of Crews, and the county court approved his account.

He pleads also that Crews' claim was barred by limitation.

Crews then, on the seventeenth of January, 1872, replied, denying that Adriance had ever settled with him

in full, and alleging that he was induced to execute the receipt by the fraudulent representations of Adriance, that the estate of Patton was insolvent, and would be unable to pay him more; and that he, Crews, had no means of informing himself of the facts; that he reposed special confidence in Adriance, and that "Adriance promised and assured him that if thereafter said estate should be found in a better condition, that plaintiff would pay the balance of his debt," etc.

The court charged the jury as follows:

"The account stated and the receipt are not conclusive against the plaintiff, but they may be contradicted or explained by other testimony.

"It is for the jury to determine from the proof whether the settlement shown by the account stated and receipt passed between the plaintiff and defendant, in 1866, was a final settlement between them in fact as it purports to be on its face.

"The presumption is that it is a final settlement until the contrary is shown by express testimony to the satisfaction of the jury.

"And the jury must be satisfied that the settlement was not made as a final settlement, or that the plaintiff was induced to make such settlement by the false and fraudulent representations of the defendant, or of others with the defendant's knowledge, or they will find for the defendant.

"If the jury believes from the evidence that the settlement between plaintiff and defendant was not a final settlement of their accounts, or that the plaintiff was induced to make said settlement by the false and fraudulent representations of the defendant, or of others with defendant's knowledge, you will find for the plaintiff."

Judgment for plaintiff.

Argument for the appellant.

The testimony sufficiently appears in the opinion of the court.

The defendant below appealed.

Geo. Quinan, for appellant.—The court erred in the charge to the jury. 1. It was error to submit to them any question of fraud or misrepresentation, when there was not a particle of proof tending to establish it. We look in vain to the statement of facts for anything that even squints that way. The plaintiff himself was sworn, and he does not deny that the representations made were true. The proof by his own testimony and his own witness (for the defendant called none) shows them to have been true.

2. It was error to submit to the jury whether the settlement was a full and final settlement, when the receipt and the account of 1866 upon the face showed them to be such, and there was no proof of fraud, accident or mistake. It was the duty of the judge to charge them that the account and receipt were a final settlement of the claim, which could be avoided only by proof of fraud, accident or mistake, of which there was no proof. He submits to them the question whether the settlement was full and final as a proposition independent of the inquiry whether there was fraud or misrepresentation in the procurement of it. From the testimony there could arise no controversy whether the settlement was full and final. The fact is certified under the plaintiff's hand, "settled in full." He swears it was a settlement, and so far as the administrator, the estate, and himself were concerned, he tells nothing to show it was not final. The plaintiff puts Adriance upon the stand, and he testifies that the settlement was full and final, and intended to be so. The charge of the judge, then, was calculated to mislead the minds of the jury in directing their inquiry to what was not an open question, unless there had been proof of the

fraud and misrepresentation which plaintiff had charged. (Pierce v. Randolph, 12 Texas, 295; Chandler v. Van Ræder, 24 How., 444; Andrews v. Smithwick, 20 Texas, 118.)

3. The charge of the judge, we submit, is not correct in the proposition that the settlement on the account and receipt are not conclusive, "but they may be contradicted or explained by other testimony." We insist that they are conclusive until it is shown that they were executed by fraud, accident or mistake. Possibly if this were a mere receipt for money the charge would be unobjectionable. But here it is something more. It is upon the face of the account a compromise, a bargain, to take so much in gold for his wages, to pay such a rent for the land, to settle the values of what he had previously received, to be allowed ten per cent. interest. And in so far, it was of the nature of a contract in writing, and to be judged by the same rules. (1 Greenleaf, Sec. 305.)

In Fuller v. Crittenden, 9 Conn., 406, it is said: "The true view of the subject seems to be, that such circumstances as would lead a court of equity to set aside a contract, such as fraud, mistake or surprise, may be shown at law to destroy the effect of a receipt."

It was error to refuse the charge asked. It stated briefly, and with direct application to the testimony, the law applicable to the plaintiff's case, more favorably for him than he was entitled. The issue he made was upon the fraudulent representations of Adriance; and if such were not made, or plaintiff was not influenced by them, we say he had no right to a recovery here.

Duff & Wilson, for appellees.

WALKER, J.—This was an action brought in the court below, by W. E. Crews v. John Adriance, as administrator of the estate of C. R. Patton.

The plaintiff claimed that there was due him for services, as overseer, rendered to the estate of Patton, about $2700.

The defendant plead a settlement, in bar of the action, and, on the trial, to support his plea, offered in evidence the following instrument of writing:

"$2555.35.

"COLUMBIA, April 10, 1866.

"Received of John Adriance, administrator of estate of C. R. Patton, twenty-five hundred and fifty-five dollars and thirty-five cents, in specie or its equivalent, in full, for five years services as manager on plantation belonging to said estate, say from January 1, 1861, to January 1, 1866, at five hundred dollars per year, in specie, and three months interest, from Janunary 1, 1861, to April 1, 1866, at ten per cent.

(Signed) "W. E. CREWS."

It is clear from the evidence that the plaintiff did not receive by a considerable sum as much money from the administrator as was due him from the estate of Patton.

Adriance was carrying on a plantation under the order of the probate court, and hired Crews at the stipulated price of eight hundred dollars a year, and it would seem from the receipt that Crews continued in this employment for five years. The receipt, however, is conclusive on the parties, unless it be shown that it was obtained by fraud or under a mistake, or upon some condition.

The instructions of the court should have been more explicit, and we think the court erred in submitting to the jury to determine whether the settlement was full and final between the parties, unless there had been some evidence to show fraud or mistake.

And upon examination of the statement of facts, it does not appear to us that there was any evidence of either fraud or mistake. There is evidence going to show that

at the date of the receipt the estate of C. R. Patton was considered insolvent, and the appellee was told by C. R. Patton, Jr., one of the heirs of the estate, in the presence of Adriance and perhaps with his assent, that if the estate should afterwards become solvent he should be paid the balance of his claim, if he compromised for the sum witnessed by the receipt. And Crews appears to have acted upon this promise, and now it is admitted that the estate of C. R. Patton, deceased, is solvent. This being the case, if Crews compromised his claim for what was considered his *pro rata* dividend, under a promise by the administrator that he should receive the full amount of his claim should the estate prove solvent, then he would not be bound by a receipt, but would be entitled to be paid in full.

But if this promise was made by Patton, one of the heirs who was interested in the estate, and formed an inducement to Crews to take less than the amount due him, then the heir so promising would be personally bound to make good the promise, as the release to the estate to an interested party would be a sufficient consideration to support the promise. And in this event the suit should have been against C. R. Patton individually. But if really such a representation was made by Adriance, and only concurred in by Patton, we are then of the opinion that the receipt would be wholly neutralized by this agreement, and the estate would remain liable for the whole of the debt.

But considering that the charge of the court may to some extent have misled the jury, we will reverse the judgment and remand the cause.

REVERSED AND REMANDED.

R. G. KYLE ET ALS. v. T. W. HOUSE.

1. Where an executor took possession of a claim against his decedent's estate, not barred by limitation, promising to allow and pay it, but, after holding it until he believed it barred, returned it disallowed—*held*, that suit within three months after such rejection was in time.
2. Confederate notes cannot be allowed to have had any value.

APPEAL from Fort Bend. Tried below before the Hon. L. Lindsey.

This suit was brought at the Spring Term, 1869, of the District Court of Fort Bend county, by T. W. House against R. G. Kyle and A. Sessums, executors of W. J. Kyle, upon two open accounts and a note; the accounts being for goods sold to Kyle to enable him to carry on his farm in Fort Bend county. The claims were presented to A. Sessums, within the time prescribed by law, duly proven, who took them, promising to allow and pay them, but, after keeping them until he believed them barred by limitation, returned them to House disallowed.

The other material facts sufficiently appear in the opinion of the court.

John T. Harcourt, for appellant.

W. L. Davidson, for appellee.

WALKER, J.—This case stands on motion for a rehearing. The motion is granted, and the cause will now be reconsidered. Neither party being satisfied with the judgment of the court below we reversed the case, and believing that the action was barred by limitation we dismissed the cause, but the statement of facts now called to our attention induces us to change our former ruling.

The evidence shows that during most of the time the statute would otherwise have run the appellee had the

claim in his possession, promising to allow and pay it, and that he so kept it until he believed that it was barred by limitation, and then returned it disallowed. If the suit was brought within three months after this, it was in time. But there is error in the proceedings of the District Court which we must notice. We see no reason why the plaintiff below could not join both his note and accounts in one action. We think the court also erred in estimating the items of Confederate money in the account at their cash value. We know of no law or decision of this court which would have authorized this proceeding. It must therefore be held as error.

We do not wish to be understood as passing upon the conduct of T. W. House, as making out a case of fraud, but simply to say, if the facts do make out a case of fraud against him, it takes the case out of the statute of limitation.

For the reasons herein suggested, the judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

C. D. GRACE ET ALS. v. JOHN R. GARNETT.

1. Where the time and place of a public sale are prescribed by law, the sheriff has no authority to sell at any other time or place; and should he do so, his acts are not merely irregular, but void and confer no title.
2. Parol evidence is admissible to prove irregularities in a sheriff's sale.

APPEAL from Fannin. Tried below before the Hon. W. H. Andrews.

This was an action of trespass to try title, brought in the District Court of Fannin county, by appellant's intestate, John R. Woolfork, February, 1868. Plaintiff

died before trial, and his surviving wife, minor heirs and administrator made themselves parties.

At the May term, 1872, defendant obtained judgment for the land in controversy, and plaintiffs appealed to the Supreme Court.

The facts are sufficiently stated in the opinion of the court.

Joseph Bledsoe, for appellant, cited the following authorities: Palmer v. Wilson, 18 Texas, 592; Paschal's Digest, Art. 5125; Foot v. Rivers, 11 Texas, 662; Hunt v. Turner, 9 Id., 387; Hanney v. Thompson, 14 Id., 144; Hollingsworth v. Holshousen, 17 Id., 46; Paschal's Digest, Art. 3770; Howard v. North, 5 Texas, 310; Johnston's Administrators v. Shaw, 33 Id., 590; Allen v. Stephens, 18 Id., 658.

Throckmorton & Brown, for appellee.—The assignment of errors present: *First.* The judgment under which the sale was made having been rendered after the stay law of the seventh day of December, 1861, was passed, it was null, and all proceedings thereunder void.

To this we answer, the stay laws were void. (30 Texas, 706.)

Second. The court erred in refusing to permit plaintiff to prove that the sale occurred after 4 o'clock P. M.

Appellant's suit was trespass to try title. Appellee plead not guilty. Appellant then attacked the title of defendant specifically by amended petition, and alleged certain defects he could not be allowed to prove; others of which no notice was taken. We think that this is analogous to the plea of not guilty on the part of defendant in action of trespass to try title; which would admit all of his defenses, but if he undertakes to plead specially he will be confined to the allegations made. (11 Texas, 662.)

If the evidence were admitted, would it vitiate the sale? Article 3776, Paschal's Digest, prescribes the rule for sale of lands. This article requires that the sale should be advertised for twenty days, etc., as well as that it should be made within certain hours.

The advertisement would seem to be at least of equal importance, yet it has been held that the total failure to advertise would not affect the title of the purchaser. (5 Texas, 302; 17 Texas, 259.)

If it be true that the sale was made after 4 o'clock P. M., it was an irregular execution of the power that would not avoid the sale, and the exclusion of such testimony would not be error. (11 Ga., 423.)

We believe that an examination of the record will show that the charges given in connection with the facts are correct and proper, and we ask that the judgment be affirmed.

WALKER, J.—This suit was brought by the intestate of the appellant to recover the land described in the petition, being a part of the headright of Rachel Baker, deceased. The plaintiff notified the defendant that he claimed title from a common source, and both parties claim through James M. Bumpass. The plaintiff claimed under a deed from Bumpass, dated February 16, 1867. The defendant claims under a constable's deed dated August 7, 1867. To support his title under this deed, he offered a judgment dated December 13, 1861, against Bumpass and in favor of one Hansell; also an execution and levy, under the judgment, on the thirteenth of July, 1867; but there is no return of a sale made under the execution.

The defendant, however, offered verbal evidence to prove that a sale was actually made, and the money applied to the Hansell judgment. In rebuttal the plaintiff

offered to prove that the sale was irregular and void, for the reason that it was made after 4 o'clock; and this evidence was ruled out.

It is claimed that the judgment in favor of Hansell was void, because rendered in 1861, subsequent to the passage of the first stay law. These laws, however, were declared by this court to be unconstitutional, in the sequestration cases, 30 Texas, 706.

To our minds it is doubtful whether a sale under execution can be proved by parol, where the sheriff's or constable's return does not show that a sale was actually made. Where so important a matter in making title under a sheriff's sale is omitted, we cannot see how a subsequent purchaser could be affected by notice of such a title, where the record does not show that the most important matter in such a transfer of title has been legally effected.

If then a subsequent purchaser would not lose his title for want of notice, it would seem difficult to hold that a prior purchaser should not take a good title where a subsequent purchaser would. This question, however, is not raised on the briefs, nor was it made to the court; we will not therefore decide it until the profession may have an opportunity of discussing it.

But if the defendant were permitted to help out his title by parol proof, we see no good reason why the appellant might not, under the pleadings of this case, have been permitted to offer in rebuttal evidence going to show the irregularity and fraudulent character of the sale.

In Howard v. North, 5 Texas, 310, this court say: "Where the time and place of a public sale are prescribed by law, the sheriff has no authority to sell at any other time or place; and should he do so, his acts are not merely irregular, but void, and confer no title."

The law prescribed that judicial sales should be made

on the first Tuesday of the month, between the hours of 10 A. M. and 4 P. M.

We think the court erred in ruling out the plaintiff's evidence. Such evidence may be very material in a case, and we think the law regulating judicial sales should be strictly pursued.

If ministerial officers are allowed to delay their sales beyond judicial hours, or sell at an hour earlier than that appointed by law, such a practice might give rise to favoritism and fraud. And if, in addition to the fact that a sale has been so made, it appears that the property has sold for a grossly inadequate consideration—such as twenty dollars for property worth ten or twelve hundred dollars—these circumstances would furnish strong evidence, if not fully explained, from which a jury would infer fraud. Under the view we have taken of this case it is unnecessary to notice further the bills of exception or the errors assigned.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

FRANCIS KAISE ET AL. v. HANS J. LAWSON.

1. Proof that the parents emigrated to Texas, and lived together as man and wife, is sufficient to establish the heirship of the children of the parties until the contrary is proven.
2. A judgment will not be reversed, though the charge be erroneous, unless it appears that the verdict was affected by such erroneous charge.

APPEAL from Galveston. Tried below before the Hon. George E. Mann.

Appellants, on the twentieth of May, 1869, filed their suit in the District Court, as heirs of John M. Korner,

against Hans J. and Mary Lawson, alleging that Korner was, on the first of June, 1863, the lawful owner of certain personal property, consisting of cattle, horses, tools, etc., amounting in value to $1995, and continued the owner thereof until the day of his death, ninth of August, 1863; that a former wife of Korner, and appellants, were the only parties entitled to take said property as heirs of Korner; and that the said former wife, Lisette, left the State in March, 1853, and never returned to live with her husband, or to claim her interest in the property; that from June to October, 1863, defendants conspired, together with other unknown persons, to defraud them of their rights in said property, and in September thereafter wrongfully appropriated the same—defendants pretending that Mary Lawson had been married to Korner on the seventh of June, 1863, and as surviving wife, had a right to the disposition of said property, and did sell it to the defendant, Hans J., for valuable consideration; that said pretended marriage was void and fraudulently procured—Korner at that time being the husband of Lisette.

On the twenty-ninth of June, by an amendment, plaintiffs alleged recent marriage of defendant, Mary Lawson, to one Johnson, and made Johnson a party. On the second of July, 1869, defendant, Hans J. Lawson, filed an amended answer, alleging that if the sale was made as alleged by plaintiffs, he bought innocently, for value and without notice; that the plaintiffs, children of Korner, were bastards, born out of lawful wedlock, and therefore without any right to relief. The jury gave plaintiffs a judgment for $3513.95. On motion, a new trial was awarded, and December succeeding the court overruled defendant's demurrer, and the cause was submitted to the jury, who gave defendant a verdict, upon which judgment was entered.

The evidence upon plaintiffs' part was that Korner came to Galveston with the mother of plaintiffs, and witnesses supposed, from the family living together, that she was the wife of Korner; that the mother died shortly after her arrival at Galveston, some sixteen years before the trial, and Korner married one Lisette, who left him in 1853; that Korner owned cows, horses, etc., and the stock sold by defendant, Mary Lawson, to Hans J. Lawson, after Korner's death.

One witness testified that Mary Lawson lived with Korner some years before their marriage. Plaintiffs proved that a marriage ceremony was performed between Korner and Mary in June, 1863, and that a divorce suit, brought years before by Korner against his second wife, Lisette, was pending at the time. None of plaintiffs' witnesses proved the time of Korner's acquisition of the property sued for; whether before or after the marriage with Mary Lawson. Defendants proved that in 1860 Korner and Mary lived together as man and wife; they had some such property as described in petition; they bought cattle during that year. Witness understood the purchase was made with Mary's own money, brought by her from Germany; was so informed by both Korner and wife. Korner refused to sell any of the cattle because they belonged to his wife. The "Korner stock" was sold to defendant, Hans J. Lawson, and one Craft, on the sixteenth of December, 1864, by said Mary and her then husband, Peter Johnson, for $500, and Craft sold to Hans J., twenty-ninth of February, 1866—bills of sale in both cases being duly recorded.

H. W. Hays, for appellants.

McLemore & Hume, for appellee.

OGDEN, J.—There is manifest error in the first clause

of the charge of the court to the jury, arising no doubt from a misunderstanding of the facts as proven upon the trial. It is claimed by plaintiffs below, and not denied, but admitted by defendants, that the mother of appellants died some eleven years before the marriage ceremony between Korner and Mary Lawson in 1863. There is also error in the first part of the charge to the jury in assuming that the facts, as proven, could possibly have raised a reasonable doubt in the minds of the jury that appellants were the lawful heirs of John M. Korner.

The facts most clearly show that Korner emigrated to Texas from Germany with a wife and four children; that they all lived together as one family, and that Korner recognized them as his wife and children until the time of his death. These facts are sufficient, beyond controversy, to establish the heirship of appellants, until the contrary is proven; and there was no legitimate testimony introduced upon the trial to raise a contrary presumption, and even the allegation in their original petition could hardly convince a reasonable mind that they intended to allege their own illegitimacy.

There is error in the last clause of the charge of the court wherein the jury are instructed in effect, that if Korner was unmarried at the time of his marriage with Mary Lawson, and if Mary Lawson (or Mary Johnson) sold the property after the death of Korner, then the plaintiffs have no cause of action, and the verdict must be for the defendants, thus making the plaintiffs' right to recover dependent upon the question of a legal marriage, and the subsequent sale of the property, whereas the law gives the surviving wife or husband the right to sell only one-third of the personal property of the deceased husband or wife.

But the most material error in the charge of the court is, it fails to present to the minds of the jury, in clear and

intelligible language, the precise questions raised by the law, and the testimony as adduced on the trial. There is no testimony showing what became of any of the personal property after the death of John M. Korner, excepting the stock of cattle. As the cause had been dismissed as to all the defendants excepting H. J. Lawson, who, under the testimony, could at most be held responsible only for the value of the cattle purchased by him, it would therefore seem that the charge of the court should have called the attention of the jury exclusively to the law in relation to the liability of Hans J. Lawson for the value of that stock of cattle. There is no evidence that the brand of the cattle was ever recorded, and the cattle were therefore simply personal property which might be transferred by any person having legal possession of the same; and a *bona fide* innocent purchaser, without notice of any adverse right or claim, for a valuable consideration paid, would receive a good title to the property. The evidence in this case shows Hans. J. Lawson to be such a purchaser, and he is not therefore responsible to appellants for the value of the stock of cattle he has once bought and paid for in good faith, even if it were the property of John M. Korner at the time of his death.

But we think the testimony in this case clearly establishes the fact that the cattle were bought with the money of Mary Lawson, and were her property, recognized as such by Korner during his life, and left in her possession, and subject to her control at the time of his death. She had full authority therefore to sell and make a good title to the purchaser of that stock of cattle, and the purchaser in no sense became responsible to appellants for the value thereof. It would seem that the jury arrived at this conclusion from the facts, since they rendered a verdict for the defendant. It is therefore clear that the errors in the

charge of the court did not mislead the jury into finding an erroneous verdict; and as the verdict is in accordance with the law and the testimony, and as the judgment follows the verdict, we do not deem it our duty to inquire, very critically, what effect the charge had upon that verdict, or by what process of reasoning the jury arrived at the conclusion they did. The judgment is affirmed.

AFFIRMED.

W. S. GORMAN v. THE STATE OF TEXAS.

There is now no penalty affixed by law for selling spirituous liquors in quantities less than one quart, the only penalty which can be enforced being for failure to pay occupation tax.

APPEAL from Goliad. Tried below before the Hon. Daniel D. Claiborne.

The facts sufficiently appear in the opinion of the court.

W. L. Davidson, for appellant.

Attorney-General, for appellee.

OGDEN, J.—The appellant, in October, 1872, was convicted of selling spirituous liquors in quantities less than one quart, in the county of Goliad, without first having obtained a license therefor, as provided by law. On the trial it was proven that the defendant did sell spirituous liquors, but the State wholly failed to prove the venue of the offense, and therefore the defendant was entitled, for this reason, to a new trial, at least. Again, it was clearly proven that the defendant had paid his occupation tax, as required by the statute of 1870; and this court, after mature consideration of the law and the question now

presented, in the case of Manning v. The State, at the last term, decided that there was now no penalty for selling liquors in quantities of less than one quart, and that the only penalty which can now be enforced is the penalty for not paying the occupation tax.

For these reasons the judgment of the District Court is reversed and the case dismissed.

REVERSED AND DISMISSED.

GEORGE S. TURNER v. THE STATE OF TEXAS.

1. While the court is reluctant to depart from the rule upholding verdicts supported by any reasonable evidence, the gross injustice which too often invades life, liberty and property, in the form of verdicts, cannot be overlooked.
2. See this case for evidence held insufficient to support conviction.

APPEAL from Fayette. Tried below before the Hon. I. B. McFarland.

The defendant was indicted at the November term, 1870, of the District Court of Fayette county, for the theft of two oxen, of the value of twenty dollars each. The jury found the defendant guilty, and assessed a fine of one hundred dollars, and imprisonment in the county jail for twelve months.

On the trial Dan Munn, the alleged owner of the property, testified that on or about the fourteenth of November he was the owner of the oxen, one brown and the other speckled. The brown ox was gentle to work, about six years old, branded N M plain on the left shoulder, and marked swallow-fork in each ear. The speckled ox was not branded. Wanting to work them, witness went out in their usual range, but after hunting a day or two

Argument for the appellant.

and not finding them, was informed that they had been seen in the possession of parties gathering cattle for Turner, and afterwards in the possession of Turner near Brushy creek stage-stand, on the Columbus road, about twelve miles from Columbus. Witness, with his brother, John Munn, then went to Columbus, to the beef packery, and there learned that Turner had that day sold his herd, consisting of some twenty-seven or thirty head, to the packery. Asking to see the hides taken from the herd, which had been slaughtered only a few hours previously, they were shown a pile of hides, after examining which they discovered what was believed to be the hide of the brown ox, and taking some water and a broom they removed the fresh blood and sand from the hide, when the brand N M appeared distinctly on the right shoulder. The speckled ox returned to his range about ten days after the driving.

John Munn testified to substantially the same facts, but in addition stated that he lived on defendant's place, and had been requested by several of the neighbors to keep a look-out for their cattle, and let them know if any were put into Turner's herd, but witness refused to do so because he was at work at Turner's saw-mill.

Defendant proved by the hands gathering the cattle that the speckled ox was claimed by W. B. Breeding, for his sister-in-law, and that when defendant first saw the brown ox in the herd he stated he did not believe the ox belonged to him. The hands insisted the ox did belong to Turner, and he, still doubting, permitted the ox to remain in the herd and drove him to Columbus and sold him.

J. R. Burns, and *Long & Oatman*, for appellant.—In any case, if there be any fair pretense of property or right in the prisoner, or if it be brought into doubt at all, the

court will direct an acquittal; for it is not fit that such disputes should be settled in a manner to jeopardize men's liberties or reputation. (1 East. P. C., 659, 661.)

If the taking be wrongful, but not fraudulent, it is not larceny, but is only trespass. * * Thus, if it should appear that the prisoner took the prosecutor's goods openly, in his presence or the presence of other persons, and not by robbery; or if he seized them upon a real claim of title. (3 Greenl. on Evi., Redfield's edition, Sec. 157, and note 1; 2 Wharton, C. L., Sec. 1769; Bish. C. L. See the various authorities referred to by the foregoing text writers.) In a case lately decided in the Supreme Court of North Carolina the court holds this emphatic language: "Stealing implies stealth. Felonious intent cannot be inferred from an act done under color of right and without fraudulent concealment." (State v. Deal, 64 North Carolina, 270.) The following authorities fully sustain our position: Herber v. The State, 7 Texas, 69; Isaacs v. The State, 30 Texas, 450; Bullard v. The State, 30 Texas, 367; Thurman v. The State, 33 Texas, 684; Gardiner v. The State, 33 Texas, 692.) In Herber's case, (7 Texas, 69), the court say: "There was not the slightest evidence of any attempt at concealment, which is the first and most important element of larceny; and the evidence shows conclusively that it was an open and an avowed claim of property." Language more appropriate to the present case could not possibly be used. In Bullard's case, at page 372, the court say: "If he took the property under such circumstances, having, from its resemblance, good reason to believe that it was his property, he cannot be guilty of a crime, if he was honestly mistaken.."

Attorney-General, for the State.

WALKER, J.—The indictment in this case charges the

theft of two oxen, each of the value of $25, the property of Daniel Munn.

It is somewhat singular that there is no evidence whatever to inculpate the appellant in the theft of one of the oxen, but the witnesses for the State exonerate him entirely.

The inquiry naturally arises, where was the witness, or were the witnesses, who testified before the grand jury, Jefferson Alexander, George Alexander, Wm. Painer and David Munn?

All of these witnesses, except Jefferson Alexander, were examined by the State on the trial, and yet none of them give evidence to show that the appellant had anything whatever to do with a spotted ox, that was turned out of the pen and went back on the range; this ox was never sold by Turner, nor in any way appropriated to his use by him. And now as to the evidence touching the brown ox, claimed to have been sold at the packing house, it is enough to say that the evidence does not support this verdict.

When all the evidence in the case is considered it is but just to the appellant to say that there is nothing to sully the honor and integrity of an honest man, much less to prove the guilt of the appellant beyond a reasonable doubt. A new trial should have been granted, or the cause dismissed.

We have hitherto admonished the District Courts upon their refusal to grant new trials in cases like the one at bar. Any departure from our own rule in upholding verdicts supported by any reasonable amount of evidence will be most reluctant; but we cannot close our eyes upon that gross injustice which too often invades life, liberty and property, in the form of verdicts, which, if supported at all by evidence, are predicated upon evidence

which should not have a feather's weight in the minds of just and sensible men, acting upon their oaths.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

THOS. MAXWELL v. THE STATE OF TEXAS.

1. The act prohibiting the carrying of deadly weapons was not intended to prevent persons traveling in buggies or carriages upon the public highway from placing arms in their vehicles for self-defense; or from carrying them from place to place for other innocent purpose.
2. A traveler is not compelled to lock his arms in his trunk or valise, where they would be useless to him if attacked.

APPEAL from Lamar. Tried below before the Hon. R. H. Taylor.

The defendant was indicted at the November term of the District Court of Lamar county, for unlawfully carrying a pistol.

J. J. Vessels, witness for the State, testified that about July 4, 1872, he was riding along the public road, on horseback, when defendant drove up behind him in a buggy, in a swift trot, having in the buggy with him one James Smith. When defendant overtook witness, he checked his team, and began a conversation, which resulted in a quarrel, during which defendant reached down in his buggy and drew out a derringer pistol, and presented it at witness, when Smith caught hold of defendant's arm and stopped him.

Verdict of guilty, with fifty dollars fine, and defendant appealed.

Maxey, Walton & Green, for appellant.

Attorney-General, for appellee.

Syllabus.

WALKER, J.—In this case the Attorney-General moves to dismiss the appeal for want of a legal recognizance. The motion is not well taken. The appellant is indicted for carrying a certain pistol about his person unlawfully. We do not think any unlawful act has been made to appear. The appellant has been twice indicted and twice tried; has been twice convicted for the same offense, and has appealed to this court in both cases.

In the opinion of this court, the act prohibiting the carrying of deadly weapons was not intended to prevent persons traveling in buggies or carriages upon the public highway from placing arms in their vehicles for self-defense, or even from carrying them from place to place for an innocent purpose. We can hardly conceive that a traveler would be compelled to lock up his arms in his trunk or valise, where they would be useless to him if attacked.

But it is contended that because the appellant had a pistol in his buggy, and on meeting a person with whom he had an altercation took the pistol menacingly in his hand, as if to shoot his adversary, he thereby commits an offense under this statute. He may be guilty of an assault with a deadly weapon, but it does not necessarily follow that he had the weapon unlawfully upon his person before committing the assault.

We are of opinion that judgment in this case should be reversed and the cause dismissed.

REVERSED AND DISMISSED.

THOMAS MAXWELL v. THE STATE OF TEXAS.

A recognizance is defective which recites that defendant shall "appear from day to day, and from term to term, and abide the decision of the Supreme Court, and not depart without leave," without stating when and where he shall appear.

APPEAL from Lamar. Tried below before the Hon. R. H. Taylor.

At the November term, 1872, of the District Court of Lamar county, the defendant was convicted of an aggravated assault, and appealing to the Supreme Court, entered into recognizance as follows:

"I, Thomas Maxwell, acknowledge myself bound to pay the State of Texas the sum of two hundred and fifty dollars, to be levied of my goods and chattels, lands and tenements; and I, Thomas Maxwell, as principal, and Sam. W. Mason and J. R. Griffin, as sureties, acknowledge ourselves bound to pay to the State of Texas the sum of two hundred and fifty dollars, to be levied of our goods, chattels, lands and tenements, jointly and severally; conditioned that, whereas, the said Thomas Maxwell was tried and convicted of an aggravated assault, unlawfully, willfully, and with intent to do great bodily harm to and upon the person of one J. J. Vessels, and his punishment assessed at a fine of one hundred dollars; and whereas, the said Maxwell filed his motion for new trial, which was by the court overruled, to which ruling the defendant excepted, and gave notice of appeal to the Supreme Court of the State of Texas: Now, should the said Thomas Maxwell appear from day to day and from term to term, and abide the decision of said court, and not depart without leave, then this recognizance to be void; otherwise to be and remain in full force and virtue."

Maxey, Walton & Green, for appellant.

Attorney-General, for appellee.

OGDEN, J.—The appeal in this case must be dismissed for the want of a sufficient recognizance.

By the terms of the recognizance the defendant is not

Statement of the case.

bound to appear before any particular court, or at any particular place, to abide the judgment and decision of the Supreme Court. A recognizance so defective is wholly insufficient to give this court jurisdiction of the case. It is a matter of no little astonishment that the clerk and officers of the courts, who have, or should have, the statute before them, where a form for such a record is prescribed, should so fatally vary from the requirement of the statute. The appeal is dismissed.

REVERSED AND DISMISSED.

J. W. WHEELER v. THE STATE OF TEXAS.

1. It is not an answer to a *scire facias* upon a forfeited bail bond, that the defendant had been arrested, tried and convicted of another felony subsequent to the execution of the bail bond, and had escaped from custody.
2. Should the defendant, after conviction, be retained in custody, the fact, if pleaded, would be an answer to the *scire facias*.

ERROR from McLennan. Tried below before the Hon. J. W. Oliver.

On the twenty-sixth day of April, 1872, the grand jury of McLennan county presented an indictment against W. A. Posey, in the District Court of said county, charging him with the "theft of a two-year old heifer." On the twenty-ninth day of April, 1872, defendant, Posey, executed his bail bond in the usual form, in the sum of $250, with plaintiff in error, J. W. Wheeler, and one S. H. Barber as sureties for the sum of $125 each. This cause was numbered on the criminal docket of said court as No. 1583. Previous to this time, to-wit, on the fifteenth day of December, 1871, another indictment had been presented by the grand jury of McLennan county, in the District Court, in which said Posey was charged with the "theft

of two mules," which said indictment was numbered 1436. Upon this last indictment Posey executed his bail bond in the usual form, and on the second day of May, 1872, the case was tried in the District Court of McLennan county, when the defendant was convicted and his punishment assessed at hard labor in the penitentiary for five years, and judgment rendered upon the verdict. Immediately upon conviction, the sheriff of McLennan county and his deputies, having already custody of Posey, started to the common jail of McLennan county, but on the way thither he (Posey) broke from their custody, escaped, and went at large, and has never again been arrested. Subsequent to this, to-wit, on the tenth day of May, 1872, cause No. 1583, in which plaintiff in error was surety on Posey's bail bond, was called for trial, and defendant not appearing when called, judgment *nisi* was rendered against him and his sureties. On the nineteenth day of June, 1872, citation issued to sureties, which being served on plaintiff in error, he, on the eighth day of August, 1872, filed his answer, setting out these facts *in extenso*, and praying for his discharge from liability by reason thereof. On final hearing said answer was adjudged insufficient by the court below, and judgment *nisi* made final as to him and the principal.

George Clark, for appellant.—The only question presented by the record is, did the conviction of W. A. Posey, the principal in the bail bond in this case, in cause No. 1436, and his caption by the officers of the State in pursuance of such conviction, operate as a discharge to his sureties in this case? Plaintiff in error contends that it did.

I. The responsibilities, rights and privileges of a surety in a bail bond under our law are clearly defined. A party arrested for an offense that is bailable has the privilege of

Argument for the appellant.

choosing his jailers. He may remain in the custody of the law and its officers, or by the execution of a bail bond, with acceptable sureties, he may transfer the custody of his person from the law to his sureties. Upon the execution of their undertaking the latter stand in the place and stead of the officers of the law. To them the custody of his person is delivered; they are his jailers, and during the time such bond is in effect he is constantly in a state of commitment. (Gay v. The State, 20 Texas, 504.) This is a tacit condition annexed to all such undertakings—a consideration for the contract, if such a term is permissible, between them and the State. They obligate themselves to pay to the State a certain sum of money in case they fail to produce the body of their principal at a certain time and in a certain place, but only in case that the State intrusts them with absolute control over the person and movements of such principal until the time designated. Should the State, through its officers, reassume custody of the accused before the time designated, the bond becomes *functus officio*, and an attempt would hardly be made to enforce its penalty. It is not conceived that this will be controverted.

Again, certain duties and responsibilities are devolved upon the State by such undertakings. With the surrender of custody to the bail, she engages to do an act that will militate against the safe keeping of the prisoner during the existence of the obligation, and that, if she assumes temporary custody, for purposes of trial or the like, and a final termination thereof should not be had, that she will again consign the accused to the keeping of his bondsmen. Mistrials are often had in our courts, in criminal matters, without prejudice to the interests of the State in matters of bail. Bonds taken previous thereto are not necessarily annulled by such proceedings. A mistrial being had, a prisoner is released on his original

bail bond, but not to go at large. In contemplation of law, he is again given over by the State into the hands of his bail. If the State in any instance fails, through her officers, to take this important step, it is not well understood how she can call upon the sureties to make good a loss which has accrued through her own negligence.

To apply these principles to the case at bar: Posey, the principal in the bail bond in this cause, being already under indictment and bond for felony, in cause No. 1436, was indicted by the grand jury of McLennan county on the twenty-sixth of April, 1872, and gave the bond now before the court on error. On the second of May, 1872, said cause No. 1436 being called for trial, the accused was presented by his bail in open court, and the State through its law officers took charge of his body. The sureties of Posey in either case have never been entrusted with his custody since. The records of the court make manifest that he has been duly convicted of a felony, and adjudged to serve a term of five years in the State penitentiary. The officers of the law say that he escaped while on his way to the common jail of McLennan county. With that, we contend, we have nothing to do. He did not escape from us. We are prepared to again assume his custody, according to the original undertaking, whenever he is again surrendered to us; and submit, with confidence, that until such surrender does take place, we cannot in law be held responsible for the safe custody of a party, when by the law itself he was taken from our custody and the same never given back to us. Such construction would conflict with elementary principle, and authorities are hardly necessary.

II. The principal was duly convicted of a felony by the judgment of a court of competent jurisdiction, not appealed from. Plaintiff in error respectfully submits that this fact alone furnishes a sufficient answer to the

scire facias in this case, and entitles him to relief from the penalty. Under this conviction the principal is as if he were dead. (Loflin *et al.* v. Fowler, 18 Johnson, 385.) By this conviction in No. 1436 Posey was taken out of the power of his bail by the judgment of the law. (Ib.) For the purposes of this case it is a matter of no consequence whether he is now undergoing the punishment awarded him or not. If he was now at hard labor in the State penitentiary, in strict accordance with the judgment of the court, that would furnish no additional cause for relief to plaintiff in error. And yet the sufficiency of an answer setting out that fact would hardly be questioned. Where, then, are we to draw the line? After a service of two or three years in the State prison? or upon deliv. ery to the warden? or while the convict is in the county jail, awaiting the necessary arrangements for his safe transportation? Is the accused any more a convict then, and utterly out of the power of sureties, than he is when upon the rendition of verdict and the entry of judgment the officers of the law lay their hands upon him? Have the sureties any control over him at the latter moment and would the officers of the law yield to their demands for the custody of his body? No, the mandate of the law is imperious, and there is then but one custodian for him—that of the law itself. The State, through its officers, becomes his jailer, and declines to share the responsibility of his safe-keeping with any one. Yet the record presents the State in the attitude of calling upon a surety to make good the appearance of a convict before her courts, when she herself forbade that surety from interposing in any manner with the execution of her judgment as to his person. Relieving the surety from the custody of the accused, and assuming the task herself, she yet holds the former to a rigid accountability for that custody he did not have. It is submitted that the moment a conviction

of the principal was had in 1436, that moment, the principal being in the custody of the law, the sureties in No. 1583 were absolved from all liabilities, and that liability on their part could not again be incurred without a setting aside of such conviction, and a redelivery of the principal into the hands of his sureties.

III. The State is in no condition to demand the enforcement of the penalty in this case. It is a general principle of law that where the performance of the condition of a bond or recognizance has been rendered impossible by the act of God, or of the law, or of the obligee, the default is excused. (Co. Lit., 206*a*; Bac. Abr., tit. Conditions, (Q); The People v. Manning, 8 Cowen, 297.) Baron Comyn lays down the rule, that the performance of a condition should be excused by an obstruction of the obligee, or by the interruption of the performance by him. (Com. Dig., tit. Condition, L. C.; see also People v. Bartlett, 3 Hill, 570.)

I know of no rule of law that makes an exception in favor of the State. An application of the principle to the case at bar seems pertinent. The State, payee and obligee in the bond, and representing in addition thereto the majesty of the law, by its own obstruction interrupts the performance of the condition. The performance of this condition has been rendered impossible by the act of the law and of the obligee. The operation of the law, and the acts of the obligee, through its courts, put an effectual stop to the progress of our custody, and placed it beyond the power of plaintiff in error to comply with his engagement. That the principal was not present when cause No. 1583 was called for trial, can in no manner be imputed to the negligence of his sureties. They had yielded up his body in obedience to the inexorable demands of the law, and the State, through its officers, had him in her clutches. That he escaped therefrom, and is

now an outlaw at large, is attributable to the negligence of the State, who was acting through its duly accredited agents and servants; and yet, as plaintiff in this action in the court below, she seeks to take advantage of her own wrong, and to enforce a penalty for a default caused solely by her own negligence. The attempt, if successful, will make a new era in the history of jurisprudence.

It may be contended (as it was in the court below) that the State would interpose, and had interposed, no obstacle to the rearrest of the escaped convict in this case, and that if the sureties would escape liability, it could be effected by diligence on their part in hunting out the offender and delivering him to the officers of the law. This hardly merits an answer. We undertook no such charge as that, nor are we peace officers or State police. Our undertaking was to keep, not to catch; and the principal was safely kept until the authorized officers of the State relieved us of the responsibility.

IV. *Per contra*, it may be urged that the answer filed in this cause contains neither of the three statutory causes that will exonerate a surety from liability (Paschal's Digest, Art. 2884); and that the decision of this court, in Barton v. The State (24 Texas, 250, as noted by Mr. Paschal), makes it incumbent on the sureties to specify some one of these causes to entitle them to relief. A careful reading of the latter case will show the mistake of the able compiler of that very valuable work. And a plain and literal construction of the statute manifests that by the enumeration of these causes, it was not the legislative intent to prohibit the entertainment of others that might be deemed sufficient by the courts of the State. If a defendant in two separate indictments for felonies should be imprisoned for life, or a long term of years, on the first a forfeiture would hardly be taken for his failure to answer to the second. Or if forfeiture should be taken, an

answer setting out that fact would, I suppose, in most courts, be held sufficient. And yet the statute makes no provision for such contingency.

Attorney-General, for appellee.

OGDEN, J.—On the twenty-sixth of April, 1872, W. A. Posey was indicted for the theft of a heifer, and executed his bail bond, with plaintiff in error as one of his sureties, in a sum of $250, for his appearance to answer to the charge in the indictment. Previously the said Posey had been indicted for the theft of two mules. He was first tried and convicted of the theft of the two mules, but made his escape from the sheriff while on his way to jail to await judgment. Eight days after the case for the theft of the heifer was called, and the defendant not appearing, a judgment *nisi* was entered upon his bail bond, and a *scire facias* issued to his sureties. At the next term of the court the sureties appeared and answered by setting up the above facts, by reason of which they claimed to be discharged from liability. The court adjudged the answer insufficient, and the judgment *nisi* was made final, and from this last judgment a writ of error has been sued out.

The very ingenious argument of counsel for plaintiff in error might be very plausible if it were not founded on false premises throughout. The defendant was not taken from the constructive custody of plaintiff in error on account of the theft of the heifer, and we hardly think it will be contended that a party who is out on bail for one offense may not be arrested and tried for another without releasing his sureties. In the case at bar, if the sureties had answered that their principal was in the custody of the law, that he was in the jail or the penitentiary for another offense, this would have excused, for the time at least, his non-appearance, and we think that such an an-

swer would clearly have been within the second cause specified in Article 2884, Paschal's Digest. Nor can we understand by what process of reasoning counsel arrive at the conclusion that the escape of the prisoner was the fault of the law or the government. Had he obeyed the mandates of the law, as his sureties had bound themselves that he would do, we think there would have been no occasion for the forfeiture of their bond.

By the escape from the hands of the sheriff the defendant committed another crime, for which he alone is directly answerable, but indirectly his sureties should be held responsible. The answer sets out neither cause specified in Article 2884, Paschal's Digest, for the non-appearance of their principal; and upon the authority of Burton v. The State (24 Texas, 252), we must decide that none other will exonerate either the principal or his sureties from liability on their appearance bond.

There is no error in the judgment of the District Court, and it is affirmed.

AFFIRMED.

W. A. CUSHMAN ET AL. v. THE STATE OF TEXAS.

1. A writ of *scire facias* upon a forfeited bail bond should show when, where and by what authority the bail bond was taken.
2. The *scire facias* should correctly describe the bail bond, and a defect in a material matter will be fatal on appeal from the judgment final.
3. A bail bond binding the defendant to appear in Refugio county and forfeited in the District Court of Aransas county, the judgment *nisi* and *scire facias* describing the bond as obligating defendant to appear and answer in Aransas county—*held*, such misdescription is fatal.
4. Where part of a county is detached and the cases sent to the new county, and bail bond in such transferred cases forfeited, the *scire facias* should state the facts necessary to show the connection between the bond and judgment *nisi*.

Statement of the case.

APPEAL from Aransas. Tried below before the Hon. T. C. Barden.

This case is brought by appeal from a final judgment upon a forfeiture of a bail bond.

On the eighteenth of September, 1871, a bill was passed by the Legislature, and sent to the Governor, creating the county of Aransas out of part of the county of Refugio. The Governor failing to approve, or return the bill, it became a law without his signature.

The bill made no provision as to process then in existence relating to matters within the territory of the new county.

On the twenty-third day of October, 1871 (just one month after the new law took effect—that is to say, one month after the expiration of the five days allowed by the Constitution to the Governor, within which he may sign or return a bill), the sheriff of Refugio, having in his hands a warrant issued by a justice of the peace for Refugio county against P. Tierney, arrested him, and took from him a bail bond for his appearance at the next term of the District Court of Refugio county.

On the first day of December following the Legislature passed another act, directing the district clerk of Aransas county to make a division of the civil cases on the court docket in his office, and transfer them to the proper county in which the defendants reside, and the criminal actions to the county in which the offense was committed, and giving jurisdiction to the respective courts accordingly; providing, also, that all writs and process should be returnable to the court to whose jurisdiction they may appertain.

On the seventh day of February, 1872, the bail bond in question was filed in the District Court of Aransas, and on the twenty-fourth of the same month a forfeiture of

the bond was declared, judgment *nisi* entered up against the principal and his sureties, and *scire facias* ordered.

On the twentieth of May, 1872, the parties served appeared, and filed a motion to quash the bail bond, a motion to set aside the judgment *nisi*, and a motion to quash the *scire facias;* and on the thirtieth of May the court overruled the two first named motions, paid no attention to the third, and rendered judgment final against Tierney, and those of his sureties who had appeared, and the defendants appealed.

Osceola Archer, for appellant.—1. The *scire facias* is clearly insufficient. (Jackson v. The State, 13 Texas, 217; The State v. Glaevecke, 33 Texas, 58; The State v. Cox, 25 Texas, 406; Bennett v. The State, 27 Texas, 702; Hill v. The State, 27 Texas, 608; Branch v. The State, 25 Texas, 426.)

2. The judgment *nisi* should have been set aside. (Paschal's Digest, Arts. 2884, 3005, 2880; Barringer v. The State, 27 Texas, 553; Jackson v. The State, 13 Texas, 219.

3. The bail bond is defective, because it did not bind the defendant to appear before the proper court.

Either Aransas or Refugio county had jurisdiction of this case. If Aransas had jurisdiction, the bond is null and void, because it bound the defendant to appear before the Refugio court. (See Art. 2732, Paschal's Digest; Tierney v. The State, 31 Texas, 41.) If Refugio had jurisdiction, the whole proceedings are *coram non judice*, and should be dismissed.

The bond in this case charges the defendant with a felony. Refugio county must then have had jurisdiction, for under the law no justice of the peace can take a bond or examine into the case where the offense charged is a felony, unless he is a justice of the peace of the county

which has jurisdiction to try the case. (See Art. 2694, Paschal's Digest.) If it should be claimed by the appellee that the crime for which Patrick Tierney executed this bond was committed in the territory of Aransas county, and not in that of Refugio (although the record is silent on that subject), then we say the bond is equally as defective as if the offense had been committed in Refugio county, for under the above Article 2694 of Paschal's Digest, the justice of the peace of Refugio county could not take the bond, but would have to turn the defendant over to some magistrate of Aransas county; if he did not do this, but assumed jurisdiction and took a bond, the bond would be void. The counties of Aransas and Refugio were separate counties at the time this bond was executed. In support of this position the court is referred to that portion of this brief, under the second error assigned, which presents the point.

4. The court erred in rendering the judgment final against the sureties, without at the same time rendering it final against the principal, Patrick Tierney. Under the statute, when the answers of the sureties, upon trial of the issues presented, show no sufficient cause for their failure to have the defendant before the proper court, the judgment is made final against him as well as against the sureties. (See Art. 2888, Paschal's Digest.)

Attorney-General, for the State.—The court will perceive that the only point really made in the case by the several grounds assigned in the motions is this: The third section of the act of December 1, 1871, provides that all writs and process issued shall be returnable to the court of the county whose jurisdiction attaches, and shall have full force and effect therein. The warrant, therefore, of the justice of Refugio, with the bail bond, became, by the operation of this section, returnable to Aransas,

and the undertaking of the bond was thereby changed from an appearance in Refugio District Court to an appearance in Aransas District Court. True there is no distinct assertion in the record that the offense charged was committed in that part of Refugio which afterwards became Aransas; but as no point as to the jurisdiction of the offense was made in the court below, and as the legal presumption is always in favor of the jurisdiction, this court is well warranted in assuming that the court below found itself rightfully in possession of the case. And this presumption is strengthened by the fact that the sheriff who took the bond returned it into the District Court of Aransas county. Until the passage of the act of December 1, 1871, he could have properly made his return only to the District Court of Refugio county, but when that law required all writs and process to be returnable to the court having jurisdiction, if the crime was committed in Aransas, the proper court would be no longer the District Court of Refugio, but that of Aransas; and there the sheriff returned it, as, by Article 5116, Paschal's Digest, requiring him to return it to the proper court, it was his duty to do.

OGDEN, J.—This is a proceeding on a forfeited bail bond, and under the rules laid down in Jackson v. The State (13 Texas, 406), and in The State v. Cox (25 Texas, 409), we are of the opinion that the *scire facias* which issued upon the judgment *nisi* is not in conformity with the law and the uniform practice in this State. The *scire facias* fails to show when, where, or by what authority the bond was executed, and these are material facts which should appear in the writ.

But the *scire facias* misdescribes the bond in an important particular. It describes the bond as binding the defendant to appear at the District Court in Aransas

county, whereas the bond, as set out in the record, binds the defendant to appear at the District Court of Refugio county. This defect must be regarded as fatal to the *scire facias*, and also to the judgment final in the case. It is possible that if the arrest had been made before the division of the county, and while Refugio county had jurisdiction of the offense, and the bond obligated the defendant to appear in that county, and if afterwards the county was divided and the bond had been transferred according to the requirements of the statutes to the new county, in such a case the defendant might have been made to appear at the new county to answer to the accusation. On failure to appear his bond might have been forfeited, but no judgment final could have been entered up against the sureties until they had been notified by the *scire facias* of this change in the jurisdiction of the case.

But it appears that the arrest was made by the sheriff of Refugio county, and the bond taken to compel the defendant to appear at Refugio some time after the division of the county, and, therefore, that bond cannot be forfeited in Aransas county. If the offense was committed in Refugio county, then the bond was properly taken by the sheriff, but it can be forfeited only in that county; but if the offense was committed in Aransas county, then the bond is not a compliance with the statute and is a mere nullity, and cannot be forfeited anywhere. The judgment final and the judgment *nisi* of the District Court is therefore reversed and the cause dismissed for the want of jurisdiction of the cause in Aransas county.

REVERSED AND DISMISSED.

Statement of the case.

HARRIS ROBERTSON v. THE STATE OF TEXAS.

The defendant was convicted of murder in the second degree; his attorneys, appointed by the court, filed a motion for new trial. On the next day all of his attorneys were arrested by order of the court for an alleged contempt; on a subsequent day the attorneys were brought into court by the sheriff, and required by the court to *argue the motion: Held*, to be such a wanton trifling with the rights of the defendant as to require a new trial, irrespective of the merits of the case.

APPEAL from Guadalupe. Tried below before the Hon. Henry Maney.

The defendant was tried for murder, and was convicted of murder in the second degree, with punishment fixed at fifteen years confinement in the penitentiary.

A motion for a new trial was filed and overruled.

Subsequent to the filing of the motion, the record shows the following proceedings:

"Now, on this day came John Ireland, John P. White and W. P. H. Douglass, attorneys of this court, who say that on the trial of this cause they appeared as counsel for the defendant under the appointment of the District Court of Guadalupe county; that on the twenty-fifth day of June, 1872, the undersigned were imprisoned by order of this court, and have remained in prison ever since, and are now so imprisoned, for the alleged reason that we would not pay a fine of one hundred dollars each, assessed against us for an alleged contempt of this court; that on this day we are brought into the court house by order of the court, and told that we are so brought in for the purpose of arguing a motion for a new trial in this cause. The motion was taken up and overruled by the court, to all which the undersigned except and object, because for the reason before set out, we have not been at liberty, or in a condition to argue the motion for a new

trial and present the same, and because we believe said motion should have been sustained. Wherefore we pray this bill be signed and filed as a part of the records in this cause.

"JOHN P. WHITE,
"W. P. H. DOUGLASS,
"JOHN IRELAND."

"The above bill of exceptions is allowed, and the court here takes occasion to say that there were no attorneys in the reach of the court who could, instead of the said appointees, represent the defendant on the hearing of the motion for new trial. And the court was advised, and did believe, that the said appointees had sued out a writ of *habeas corpus* to be heard soon before one or more of the judges of our Supreme Court, and that said appointees, White, Ireland and Douglass, would on this day be taken to the city of Austin, and that thereby the ends of justice be defeated.

"HENRY MANEY, Judge."

A further statement of the case is not necessary.

A brief on the merits for defendant is on file, but it does not appear by whom filed.

Attorney-General, for the State.

OGDEN, J.—On the twenty-second of June the appellant was tried and convicted of murder in the second degree, and on the twenty-fourth of the same month, counsel for the defendant filed a motion for a new trial. It further appears, from the bill of exceptions, that on the day subsequent to filing the motion for new trial, all the counsel for the defendant, who had been appointed by the court to take charge of the prisoner's defense, were arrested by order of the court for an alleged contempt of the court committed previously, or rather for refusing to pay a fine

assessed against them for a contempt. It further appears, from the record of this case, that on the twenty-seventh of the same month, the counsel who had been appointed to defend the prisoner, and who had been arrested and imprisoned by order of the court, and while under the arrest, were, by further order of the court, brought into the court room in charge of an officer, and were required by the court to argue their motion for a new trial. To all of which they excepted and protested. We are of the opinion that this was such an error in the court—such a total disregard of the rights of attorneys, and of a due consideration for the profession—such a wanton trifling with the rights of a defendant charged with a capital felony, and with the dignity of courts, and so subversive of every principle of law and justice, that the judgment of the District Court should be reversed and the case remanded for a new trial, and it is accordingly so ordered.

REVERSED AND REMANDED.

THE STATE OF TEXAS v. F. F. COLLINS.

1. In an indictment for obstructing a public road it is not necessary to allege the materiality of the obstruction or that the road had been laid off by the proper authorities as a public highway, nor to negative the right of the defendant to place the obstructions in the road.
2. These are matters of defense or mitigation, and may be shown by the defendant.

APPEAL from McLennan. Tried below before the Hon. J. W. Oliver.

The case is stated in the opinion.

Attorney-General, for appellant.

No counsel for appellee.

OGDEN, J.—The court erred in this case in sustaining the exceptions to the indictment. The indictment charges that the defendant "did with force and arms the public road leading from Waco by way of Robinsonville to the county line in direction of Marlin, unlawfully obstruct by then and there erecting a fence across the same." We think this indictment sufficiently definite and certain to charge an offense against the laws of the State, as provided in Article 2579, Paschal's Digest. It was wholly unnecessary to allege the materiality of the obstructions, or to negative the idea that defendant was authorized to place the obstructions in the road further than to allege that he unlawfully obstructed a public road, nor was it necessary to allege that the road so obstructed had been laid off by the proper authorities as a public highway.

These were matters of defense which may be shown as a justification or in mitigation of the act, but were not necessary to be alleged or proven by the State in order to sustain the charge. The offense is the obstruction of a public road or highway, so as to hinder or annoy travelers, who have a right to travel unmolested such roads or highways at their will or pleasure.

The judgment is reversed and the cause remanded for trial.

REVERSED AND REMANDED.

ANDREW HICKMAN v. THE STATE OF TEXAS.

In an issue of insanity, the non-professional witness should not be allowed to give his opinion as to sanity or insanity, but should be confined to the acts of the subject, leaving the jury to form their opinion as to their cause.

APPEAL from Leon. Tried below before the Hon. John B. Rector.

The facts sufficiently appear in the opinion.

No counsel for appellant.

Attorney-General, for the State.

OGDEN, J.—There may have been error in the rulings of the court in sustaining the objections raised in regard to the question propounded to the witness Thomas, upon the subject of insanity or imbecility.

The statements of a simple opinion or belief of a non-professional man, in regard to the mental condition of another person, would be of little value in aiding a jury to arrive at a correct conclusion, unless the facts upon which that opinion was based were also given. But whether insanity or imbecility actually exists, is generally a question of opinion which cannot be demonstrated other than by the actions or language of the party.

A professional man may judge with some degree of accuracy, from pathological symptoms, of the mental condition of a patient; but the non-professional man has only the actual demonstrations of the person from which to form his judgment; and in that case it would, in our opinion, be a better practice, as a general rule, to confine the witness to a statement of those demonstrations, and leave the jury to form their own opinion as to the cause. And yet it is held by high authority that the opinions of witnesses on the question of sanity are admissible to prove that fact. (1 Greenleaf on Evidence, p. 440.)

But the facts proven on the trial in this case render the ruling of the court quite immaterial. The testimony of the mother of appellant clearly establishes the fact of sanity, while the proof of his acts on the day he committed the offense, as well as subsequent acts, show conclusively that he had a clear conception of the fact that he was violating the law and committing a wrong.

And we think the simple opinion of a non-professional man on the question of insanity, independent of any and all facts upon which that opinion was founded, should have had but little influence upon the jury or the court below. There is no such error in the ruling of the District Court as will require a reversal of the judgment, and it is affirmed.

AFFIRMED.

REBECCA M. BROWNING v. SLEDGE & BROWNING.

1. The maker of a promissory note may pay the same in any way he and the holder may agree upon, provided the maker has no notice that the bearer had the note for collection only.
2. Payment in other notes instead of money made by the maker to the bearer, who had an interest in the note—*held*, good against the owner unless knowledge be brought to the maker of the agency of the holder.

APPEAL from Washington. Tried below before the Hon. J. M. Onins.

This is a suit by R. M. Compton, executrix, as holder of a promissory note of date ninth of January, 1860, for $975, executed by King, Sledge & Co. to P. W. McNeese or bearer. The loss of the note was alleged.

The defendant, Sledge, plead payment in full.

The testimony showed that J. D. Giddings, A. G. Compton (plaintiff's testator), P. W. McNeese and A. M. Lewis had hired certain negroes from one Applewhite to work on the W. C. Railroad. The work was afterwards let by contract to King, Sledge & Co., who assumed the liability incurred for the hire of the Applewhite negroes. To secure the amount assumed, they executed to P. W. McNeese the note sued on.

About the maturity of the note Sledge found it in the hands of A. M. Lewis, and paid it to him by transferring

a note on one Johnson, secured by a lien on land, Johnson being solvent. Lewis endorsed the note, "Paid in full," and surrendered it to Sledge.

Subsequently, McNeese parted with his claim to the note to Compton, the appellant's testator.

The testimony was somewhat conflicting between McNeese and Sledge, both of whom were examined.

The judge instructed the jury as follows:

"If you believe that A. M. Lewis was one of the beneficiaries of the note executed by King, Sledge & Co., he had the authority to settle it in any manner that might be agreed upon between him and Sledge.

"If you find that the defendant, Sledge, paid the note to A. M. Lewis, and that it was delivered by Lewis to Sledge, or settled in full, it is immaterial how or in what it was paid."

Verdict and judgment for defendants.

Appeal by plaintiff.

Giddings & Morris, for appellant.—There is a marked distinction between partners and joint owners. (Story on Prom. Notes, §§ 255 and 239.)

In notes payable to joint payees, all must endorse to transfer. (Doug. Rep., 659, Carrick v. Vickery; Chitty on Bills, 66; Story on Prom. Notes, Note P, 311; 29 Texas, 360, Trammell v. McDade.)

An agent or attorney cannot, without express authority, receive payment for a note in anything but money. (Story on Prom. Notes, § 389; Chitty on Bills, 438; 26 Texas, 730, Wright v. Dailey.)

Sayles & Bassetts, for appellees, cited 5 Texas, 515, Greneaux v. Wheeler.

OGDEN, J.—Appellant, as the executrix of Alexander G. Compton, deceased, brought this suit on a promissory

note for the sum of $975, executed to Parrott W. McNeese, and transferred by McNeese to appellant's testator. The plaintiff below, in her petition, alleged the loss of the note sued on.

The defendant set up full payment, satisfaction and cancellation of the note, and on the trial produced the note, endorsed satisfied and cancelled by A. M. Lewis.

It was in proof that the defendant, Sledge, had paid the note to Lewis by transferring the note of Johnson in lieu thereof, and that Lewis thereupon receipted the note sued on. It is contended for appellant that as the note was placed in the hands of Lewis, an attorney, for collection, he had no authority to receive anything in payment therefor but money, and that the exchange of this for the Johnson note is not binding on her, and that she now has the right to demand payment on the Sledge note. The note, however, is payable to bearer, and it is in proof that Lewis at one time at least had an interest in the note, and the maker swears that at the time of payment, or exchange of notes, he knew that Lewis was interested in the note, and knew nothing of its being placed in his hands for collection. In view of this testimony, we think it wholly immaterial whether the note was placed in Lewis' hands for collection or not, since the maker had no notice of any such facts.

The cause was submitted to a jury under proper instructions from the court, and they found a verdict for the defendant, and under the facts proven we think they were authorized in their finding. The judgment is therefore affirmed.

AFFIRMED.

A. M. McKINNEY v. WARREN T. NOBLE.

1. The statutes of Texas give to the surviving parent the guardianship of the children of the marriage.
2. The mother, although divorced and having the custody of the children decreed her, cannot by will deprive the father of the guardianship of their persons upon her death.
3. She can dispose of her property, and if she bequeath it to her children, she may, for their use, appoint a trustee to manage it against the rights of the father.

APPEAL from Montgomery. Tried below before the Hon. James Masterson.

The facts appear in the opinion of the court.

N. Hart Davis, for appellant, cited Osborne v. Bank U. S., 9 Wheaton.

Joseph Boone, for appellee.

WALKER, J.—By Section 308 of the General Probate Act of August 15, 1870, it is declared: "The parents, or the survivors of them, except in certain cases, have a natural right and duty to take care of the persons of their minor children, and the law makes no further provision for such cases." The certain cases referred to are those included in Section 321. Section 314 provides for cases where parents do not live together, and declares that their rights are equal, and the guardianship of the minor child shall be assigned according to circumstances, taking into consideration the interest of the child alone.

Were both the parents living in this case, there could be no difficulty in determining the right of guardianship, but such is not the case, and the facts are peculiar.

Martha A. McKinney, the former wife of the appellant, was divorced from her husband by a decree which

gave her the custody of her minor child, Catherine Estelle McKinney. Mrs. McKinney, for some cause or other, lived for a number of years with her father, Warren Noble, separate and apart from her husband.

After her return to her father's house, the child, Catherine E., was born.

Mrs. McKinney's father appears to have invested some money for the use of his daughter in a business partnership with his son, Warren T. Noble, the appellee.

The business appears to have been successful, and the investment increased to a handsome sum.

Mrs. McKinney made her last will and testament, devising her property thus acquired to her child, and also nominated her brother, Warren T. Noble, guardian for the person and estate of her child.

This will cannot deprive the father of guardianship of the person of his child, but it may be regarded as the declaration of an express trust, and Warren T. Noble held to be the trustee. We therefore reverse and remand the case, with instructions that Warren T. Noble shall qualify as trustee of the minor child's estate, and control the property for her benefit; and the father, if he desire it, may be appointed guardian of the person of the child until such time as she, by law, shall have the right to choose her own guardian.

REVERSED AND REMANDED.

W. W. HAMMOCK v. D. D. MAY.

1. It is the duty of the district clerk, upon filing a motion, to enter the same at once upon the motion docket; but a failure to so enter a motion for new trial, *filed* within two days after the trial, should not be allowed to work an injury to the party filing the same.

Statement of the case.

2. A motion handed to the clerk, and by him endorsed filed, with his official signature, is properly filed, although the clerk, at the time, was not in his office.
3. See as to practice in filing and docketing motions.

APPEAL from Coryell. Tried below before the Hon. J. P. Osterhout.

On twelfth day of July, 1871, on trial upon the merits, the jury rendered a verdict in favor of the plaintiff. On the same day judgment was rendered in his favor.

On 13th, the defendant filed his motion for a new trial, setting up several grounds.

The motion was filed after the adjournment of the court, on the night of the 13th, and when the clerk was out of his office. No instructions were given to the clerk that the motion should be entered upon the motion docket. The attorney filing the motion took it and all the other papers in the case to his room, giving his receipt for them. The papers were returned to the clerk on the 15th. The attorney for the plaintiff had, on the 14th, called upon the clerk for such motion, and examined the docket, and had no notice that the motion had been filed until the 15th, which was the last day of the term.

The motion was entered upon the motion docket on the 15th.

The plaintiff excepted to the motion because it had not been filed within two days after the trial.

The court refused to hear the motion. The judgment was entered, and from the action of the court in refusing to entertain the motion, an appeal was taken.

The other facts appear in the opinion.

No brief furnished for appellant.

Robards & Blackburn and *McGinnis & Lowry*, for appellee, cited 4 Texas, 336, Beale v. Alexander; 6 Texas, 541, Warren v. Bailey; 7 Texas, 520, McKean v.

Ziller; 9 Texas, 59; 16 Texas, 312; 19 Texas, 270; and Paschal's Digest, Arts. 1453 and 1473.

OGDEN, J. Article 1473, Paschal's Digest, provides that "all motions for new trials, in arrest of judgment or to set aside a judgment, shall be made within two days after the rendition of verdict, if the term of the court shall continue so long." And Article 1453 further provides that "there shall be a motion docket, to be kept by the clerk, in which he shall enter all motions filed in the court." The manner of filing all papers in the court, and the requisites necessary to constitute a filing, are specifically defined in Article 1445, Paschal's Digest. From this it is clear that no paper can be considered filed in a cause unless the clerk shall have endorsed thereon the day on which it was filed and signed his name thereto. It is not absolutely necessary that the clerk, when he marks a paper filed, should be in the court room or his office in order to perfect the filing, provided the same be done in good faith by the clerk, and not in such a manner or under such circumstances as to work an injury to other parties.

The statute cited makes it the especial duty of the clerk, where he has filed a motion, to enter the same in a motion docket, to be kept by him for that purpose. He should in no instance allow a motion filed by him to go out of his possession until the same has been entered on the motion docket, and a failure of the clerk to perform any duty expressly required of him by the law should not be permitted to work an injury to other parties.

The fact that the attorney who presented the motion wished to take the same, with the other papers of a cause, out of the office for examination, is no excuse for the clerk's failure to make the required entry in his motion docket. Attorneys employed in the prosecution or

defense of a cause have a right, under proper regulations, to take all the papers filed in the cause in which he is so employed out of the office, for a reasonable time, for examination, and when so doing he should not be held responsible for the negligence of the clerk.

In the case at bar the verdict was rendered on the twelfth day of the month, and on the night of the 13th motions for a new trial and in arrest of judgment were marked filed by the clerk, out of his office, who immediately went to his office and delivered the other papers in the cause to the attorney who presented the motions, but failed to enter the motions on the motion docket until the morning of the 15th. We think the motions were filed in time, and had the clerk performed his duty no question in regard to the same would now have been raised.

There is no improper act or motive imputed to the attorney in taking the papers from the office, by the affidavit of the clerk or any other person. And we are of the opinion that the court erred in refusing to hear and consider the same. There are two records in this case, but from the imperfection of both, we are unable to form any judgment in regard to the merits of the cause attempted to be presented; and for the reasons herein indicated, the judgment is reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

WILLIAM ALLISON v. W. S. BROOKSHIRE.

The law exempting certain property from forced sale was intended to secure to each family a means of support; and, since in the exemption of two horses it was intended to protect to a family animals to use, it cannot be construed to exclude geldings, mares or mules, all being used for the same purpose.

APPEAL from Williamson. Tried below before the Hon. E. B. Turner.

The facts appear in the opinion of the court.

Houghton & Fisher, for appellant.

No brief for appellee has been furnished to the Reporters.

OGDEN, J.—Appellant brought this suit against the appellee to recover a certain mule alleged to have been unlawfully seized by the latter, and for damages for the wrongful detention of the same. The defense set up is that the animal was lawfully seized, under and by virtue of a writ of execution which issued from a justice's court, to satisfy a judgment rendered in said court against the plaintiff below. A judgment having been rendered against the plaintiff in the District Court, he has appealed.

It was claimed in the court below, and is insisted upon here, that the animal seized by the appellee was exempted from seizure and forced sale by the Constitution and laws of the State, and that therefore the seizure was unlawful and void. The act of the Legislature of 1870 (p. 127), passed in full conformity with the requirements of the Constitution, exempts to every family from forced sale, among other things, two horses; and as it was clearly established on the trial below that at the time of the seizure appellant was the head of a family and had but two horses, or rather but one horse and one mule, those animals were not subject to seizure or forced sale for debt, and these facts alone should have entitled the appellant to a recovery of the animal sued for, as the mule seized by the officer was one of those two.

The wisdom of the law exempting certain property from forced sale cannot now be legally called in question,

while it is the imperative duty of the courts to enforce that law whenever its humane provisions have been infracted. Property may be levied upon under an execution, and the officer making the levy will be protected so long as he is ignorant of the fact that the property is not subject to execution, but whenever the interposition of the powers of the court is invoked to protect the legitimate rights of a family, all exempted property may and should be restored at any time while the same is in the custody of the law. We think it was clearly established on the trial below that the animal sued for is exempted to the family of appellant from seizure or forced sale, and that the court erred in not rendering a judgment accordingly.

But it may have been contended in the court below that as the statute does not specifically exempt a mule *eo nomine*, therefore the animal seized was subject to levy and sale for debt. We can hardly think the Legislature intended to use the word horses in that restricted sense. The object of the Legislature in passing the exemption law was manifestly to secure to each family a sure means of comfort and support, in the enjoyment of which they might feel secure. In the exemption of two horses the Legislature evidently intended to protect to a family animals to cultivate the soil, as well as to ride or drive; and we think it would be a very illiberal construction of the legislative intent to say, that the use of the word horses, in that connection, excluded geldings, mares or mules, since all are used for the same purpose.

In the case of Cobbs v. Coleman, 14 Texas, 595, it is substantially said, that statutes should be liberally construed so as to meet the objects intended to be accomplished by the Legislature, and that a horse, as used in that connection, "was not reserved because he was a horse, but because of his useful qualities, and his almost

indispensable services." The usefulness and services of a mule are identical with that of a horse, at least so far as the exemption is concerned; and as in common parlance the mule is hardly distinguishable from the horse, we are of the opinion that the word *horses*, as used in that statute, includes mules also.

This view of the case must dispose of the judgment of the District Court as rendered; and as the case will go back for another trial we deem it proper to say, the execution produced in evidence on the trial is wholly insufficient of itself to sustain the levy and seizure of the mule. In the first place, as there is no indorsement on the writ of the proper execution by the officer making the seizure, there is no evidence that the seizure had been made by virtue of that execution. Again, it is alleged by the plaintiff below that the execution was issued without a judgment to support it. This allegation threw the burden of proof upon the defendant, who would protect himself in his levy, to show, affirmatively, that there was such a judgment. But by the transcript from the justice's docket he proves that no judgment was in fact rendered, and without a judgment to support the execution it is absolutely null and void, and can confer no authority upon the officer to make the levy. (Criswell v. Ragsdale, 18 Texas, 444; Bailey v. Knight, 8 Texas, 61; and Walker v. Emerson, 20 Texas, 710.) Indeed, under the authority of the cases cited the execution should not have been admitted in evidence until the judgment, upon which that execution had issued, had been established. We think the court erred in overruling the motion for a new trial, and the judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

OLIVER A. KEEP v. JOHN B. SIMPSON.

In a suit upon notes executed for land and secured by the vendor's lien, and against the maker of the notes in possession of the land, if defects of title to the land, plead in defense, be removed by plaintiff or others before the trial, the plaintiff may recover.

APPEAL from Fannin. Tried below before the Hon. W. H. Andrews.

The facts sufficiently appear in the opinion.

S. B. Maxey, for appellants, cited Story on Promissory Notes, § 178, and notes; 2 Parsons on Contracts, 278; 5 Cushing, 126, Martin v. Roberts; 1 Denio, 69, Masson v. Bovet; 25 Texas, 160, Green v. Chandler; Russell & Mylne, 296, Dalby v. Pullen.

Throckmorton & Brown, for appellee, cited 2 Texas, 148, Farpley v. Poague; 10 Texas, 367, Perry v. Rice; 19 Texas, 351, Taylor v. Johnston; 20 Texas, 178, Woodward v. Rogers; Kerr on Fraud, 319: Story's Eq., §§ 506, 1332; 20 Texas, 260, Terrell v. De Witt.

OGDEN, J.—In 1865, O. H. Keep sold to John S. Chisum a certain tract of land, taking his notes secured by the vendor's lien for the purchase money. And in 1866 Chisum sold the same land to appellants, who executed their notes to him. Chisum subsequently transferred appellants' notes to Keep, probably in exchange for his notes given to Keep. Upon these notes received by Keep from Chisum this suit was brought.

The defense set up is, alleged fraudulent combinations and representations of Keep and Chisum, in relation to the title to the land purchased, in order to cheat and defraud appellants; and a failure of consideration for the notes sued on, by reason of the outstanding superior

title of Mrs. Keep in and to the land; and also by reason of the vendor's lien in Keep.

To meet these defenses, the plaintiff below filed a quit-claim deed from Mrs. Keep to the defendants, of the land, and a full and complete relinquishment of the vendor's lien from himself.

These two instruments fully completed and perfected the title to the land in the defendants below, and rebutted all allegations of want of consideration for the note sued on, as well as all allegations of fraudulent representations in regard to the title to the land.

They claim to have contracted for a perfect title, and they have received one; they have all they bargained for, and they should not now be heard to ask for more, or a different thing from what they promised to pay for.

But it is claimed that the tender of the deeds came too late, and that therefore they were not obliged to receive them. But they fail to prove an eviction from the land, or even any damage by reason of their former imperfect title, and we can now see no good reason for their complaint, or why they should not be made to pay the purchase money according to their original contract. We discover no equity in their demand for a rescision of the contract, since, in addition to the fact that they have received all they purchased, and their vendor has by himself or others fully complied with his part of the contract, while they further show and acknowledge themselves wholly unable to return the property as they received it, and to place their vendor in the same condition as when the contract was made. There are many questions raised in the pleadings and argument of counsel which do not require notice in order to an equitable disposition of this case, and as we discover no error in the judgment requiring a reversal of the same, it is affirmed.

AFFIRMED.

BRYCE & LYMAN v. G. W. JONES ET AL.

1. Counter-affidavits controverting the allegation of due diligence in obtaining the testimony of witnesses will be heard on application for the second or third continuance.
2. It is not a sufficient excuse for failure to obtain an attachment for a witness, that his fees had not been tendered; and as an attachment is necessary to enforce the attendance of the witness neglecting the subpœna, it follows that it is necessary to show the tender to the witness of his fees, upon application for continuance on account of his absence.

APPEAL from Bastrop. Tried below before the Hon. J. P. Richardson.

The only point noticed in this case is the action of the court below upon the application by appellants, who were plaintiffs below, for a continuance.

On April 5, 1871, plaintiffs presented their application for continuance, as follows:

"Now come plaintiffs and say, that they cannot go safely to trial of this cause for the want of the testimony of A. P. Swisher, a witness for plaintiffs, who resides in the said county of Bastrop and State of Texas. Plaintiffs would further represent that the testimony of said Swisher is material to the case to aid plaintiffs in the maintenance of their suit. Plaintiffs would further represent that they have used due diligence to procure the attendance and testimony of the said Swisher, in this, that they caused subpœnas to be issued for the said Swisher, and served upon him at the following dates, to-wit: April 23, 1869; December 14, 1869; March 22, 1871; said subpœnas being on file and made a part of this affidavit and hereto attached; and that the said witness has been in attendance at every term of said court up to the present term of the same. Plaintiffs would further state that the said Swisher is not absent with the consent or at the contrivance of plaintiffs, and that they expect to procure his

attendance at the next term of this court. Plaintiffs would further state that they do not know why the said Swisher is not in attendance; that this their first application for a continuance is not made for delay; wherefore plaintiffs pray that this cause be continued until the next term of this court.

"W. M. BRYCE.

"Sworn to and subscribed," etc.

The continuance was resisted, and Moore, one of the defendants, filed his affidavit as follows:

"And now comes the defendant, Moore, who resists the application for continuance made by plaintiffs on account of the absence of the witness, Swisher, and says that this cause was regularly reached in its call upon the docket yesterday at 12 o'clock; this witness was then absent and in contempt of the court, and this within the knowledge of the plaintiff, Bryce, and his attorney, J. D. Sayers; that said case was postponed upon request by plaintiff till 9 o'clock this morning; that it was the duty of plaintiff to take other and different modes of compelling the attendance of said witness, instead of relying upon said subpœna or order to continue said cause. That said witness resides about ten miles from the court house, so this defendant is informed and believes.

"L. W. MOORE.

"Sworn to and subscribed," etc.

By leave of the court the plaintiff filed an additional affidavit, as follows:

"With leave of court, now come plaintiffs and say, that on yesterday, since 12 o'clock, one of the plaintiffs, W. M. Bryce, went to the residence of the said witness, A. P. Swisher, for the purpose of securing his attendance, so that there might not be a failure of trial in consequence of his absence, and for the purpose of tendering said

witness his fees, and requesting said witness to be present upon the trial of this cause.

"When called this morning plaintiff further states, that the said Swisher was not at home when the said Bryce went to see him yesterday, and could not be found. Plaintiff further states, that the said Swisher did, on Friday last, the thirty-first day of March, 1871, during the term of this court, and before this case was ever reached or called, promise plaintiff that he would not fail to be present and testify as commanded to do by the subpœnas served upon him as aforesaid. Plaintiffs state that the said Bryce remained at the residence of the said Swisher until after dark on yesterday, waiting for him to return home, but said Swisher did not come. Plaintiff would further state, that he left word with the said Swisher's wife to tell the said Swisher to be certain to be in attendance upon the court by 9 o'clock A. M. of to-day. Plaintiffs would further represent, that the said Swisher resides about ten miles from this place. Plaintiffs deny that they ever agreed to try this case absolutely on to-day; but the postponement was merely for the purpose of having their attorney present to attend to the case when called.

"W. M. BRYCE.

"Sworn to and subscribed," etc.

The application for continuance was overruled, and judgment was rendered for the defendants.

The plaintiffs below appealed.

J. D. Sayers and *Terrell & Walker*, for appellants.

L. W. Moore, *Sheeks & Sneed*, and *J. B. Morris*, for appellees.

WALKER, J.—In the case of Hyde v. The State, 16 Texas 453, Mr. Justice Wheeler elaborately reviewed the

authorities, and laid down the rule that counter-affidavits are admissible to disprove due diligence.

We have long felt the necessity of the application of this rule in second and subsequent applications under our statute. If the affidavit for continuance remains uncontradicted, it forces the court to a continuance of the cause in many cases where the suspicion of bad faith and want of diligence is irresistible.

After the postponement of the cause in this case from 12 o'clock until the sitting of the court on the following day, the party demanding the witness should have resorted to an attachment. But the fees of the witness had not been tendered, it will be answered. This is not a good answer to the objection, for if the party wishes to avail himself of all the necessary process of the court to bring in his witnesses, he should place himself in a condition so to do, and if he cannot have an attachment without first tendering the witness fees, the fees should be tendered. (See Article 3720, Paschal's Digest.) This article is analogous to the statute of 5th Eliz., C. 9, Sec. 12; and we believe the rule we now lay down is strictly in accordance with the practice of the English courts under that statute. (1 Greenleaf, Sec. 310; 2 Phil. Ev., 370.) After a careful examination of this case, we think our former opinion was correct, and we affirm it.

AFFIRMED.

L. A. LOLLER v. A. B. FROST ET AL.

1. As at common law, so by the statutes of Texas, the lands of an intestate vest upon his death in his heirs, and they cannot be divested of title unless made parties.
2. It was, therefore, error in a suit by an administrator to enforce the vendor's lien, and which had been changed by the defendants in possession

into an action to quiet title, to adjudicate title to the said defendant against the administrator without making the heirs parties.

[NOTE.—This rule varied by Section 22 of Chapter 78, approved May 27, 1873, allowing suits for land to be revived against the administrator and the proceedings to bind the heirs.—REPORTERS.]

APPEAL from Hopkins. Tried below before the Hon. W. H. Andrews.

This suit was brought by L. A. Loller, executor of G. H. Blunt, upon two promissory notes, executed by defendant, A. B. Frost, and to enforce the vendor's lien therefor upon lands sold by Blunt to Frost and by Frost to the defendant Steadham.

Various defenses were interposed, and Steadham reconvened, alleging his purchase of the land from Frost without notice, and asking that his title be quieted as against the claim of the estate of Blunt.

The heirs were not made parties, and judgment rendered June 6, 1872, for plaintiff against defendant Frost for the amount of the notes, but in favor of defendant Steadham, quieting his title against the plaintiff.

The plaintiff appealed. The opinion of the court being confined to the want of parties, the other discussions of practice are omitted.

A. M. Jackson, for appellant.—The suit was brought by executors for the enforcement of a vendor's lien. But it was not as such a suit that the case went to a final trial, nor is the final judgment such an one as could be rendered in a suit of that character. It is reasonably certain that there were proceedings in the District Court which have not been carried into this transcript; but as neither party suggests a diminution of the record the case must be disposed of as it appears.

To the January term, 1871, Steadham filed a pleading which made an essential change in the character of the

litigation. He alleges in this paper that the land had passed out of his possession into that of the plaintiffs, and claims what he calls a "writ of restitution," and judgment for rents and damages. Again he files a second pleading of a similar import to the May term, 1871, but prays that his judgment for damages be rendered against Loller in his individual character, and not as executor of Blunt. In both of these pleadings he alleges that the pretended vendor's lien is a cloud upon his title, and prays that it be removed, and that his title be quieted, etc. To the second of these pleadings exceptions were filed, but the record shows no ruling upon them.

The jury returned a general verdict in favor of Steadham, and upon it the court decreed that the lien was invalid and constituted a cloud upon Steadham's title, and that it be removed and Steadham be quieted in his title, with "writ of restitution," etc.

I submit that this judgment is necessarily erroneous. By his amended pleadings Steadham, one of the original defendants, converted the suit into an action for the land, with himself as plaintiff and Loller as defendant. Loller was an executor, and claimed no rights in any other character. Under our statute (Paschal's Digest, Art. 1447) an executor may sue for land of his testator. But the rule does not work both ways. An executor cannot, as such, be sued for land of his testator. (Barrett v. Barrett, 31 Texas, 344.) If an executor is in possession of lands of a third person, the latter must sue him as a trespasser, not as an executor; and if he apprehends that the defendant will claim title or possession in his fiduciary capacity, then he must bring in the heirs or devisees of the testator as co-defendants. And in such case a judgment affecting the title or the possession, rendered against the executor in his fiduciary capacity, and not rendered against the heirs or devisees, is erroneous. The

case of Barrett v. Barrett, 31 Texas, 344, fully sustains this position, and I refer to it as giving a clear exposition of the legal principles involved in it.

If this suit, pending its progress in the court below, had got into such a condition as to make it advisable for Steadham to obtain an adjudication of the title or of the possession as against Blunt's representatives, then it was indispensable for him, in order to obtain such relief, to have made Blunt's real representatives—his devisees or heirs—parties to the suit. If he failed to do this, and proceeded to judgment with no other party besides Blunt's executor, then, if the judgment purported to adjudicate the title or the right of possession, it was necessarily erroneous. (See Barrett v. Barrett, above cited.) And that is exactly what has been done in this case.

As this case was made up by the pleadings, there were two courses open to the court below, viz., it should have required Steadham to implead Blunt's real representatives, or it should have stopped its judgment by dismissing him with his costs. But it pursued neither of these courses. It attempted to adjudicate the title and possession, without bringing in the parties whose rights were necessarily involved in such an adjudication, and therein there was such error as requires a reversal of the cause.

John P. Hill, for appellee Steadham.

The brief is elaborate and exhaustive on questions of notice and of practice touching motions for new trials, and as these subjects are not in any way discussed by the court, the brief is not inserted.

WALKER, J.—There are several questions raised upon this record, upon some of which there is a difference of opinion between the members of the court; but upon the most material questions we are all agreed.

Syllabus.

The appellant brought this suit as the surviving executor of Blunt, to enforce a vendor's lien in favor of Blunt's estate.

During the progress of the cause it is changed into an action to try title, and there is a judgment in favor of Steadham, quieting his title and giving him the land unincumbered by a vendor's lien; and this is done without making the heirs of Blunt parties.

In Barrett v. Barrett's Administrator, this question is decided, and the court say that the title to land must not be adjudicated, where it is held by an intestate, without making his heirs parties.

The administrator may be sued as a trespasser; he may sue to recover the land of his intestate; but if he is not in possession, he cannot be sued as a mere fiduciary.

By Section 112 of the law governing the descent of estates and the administration thereof, the lands of an intestate, on his demise, vest in the heir (as at common law), subject only to the rights of creditors.

This case must be reversed and remanded.

REVERSED AND REMANDED.

RICHARD LOYD v. W. H. MASON.

1. Under the probate act of 1870 no administration can be granted after four years have elapsed from the death of the intestate.
2. After that time has elapsed the presumption is that there are no debts, or if any that they are barred by limitation, and that the property has gone into the possession of the person entitled to receive it.

APPEAL from Marion. Tried below before the Hon. J. D. McAdoo.

The facts appear in the opinion of the court.

Rogers, McKay & Blackburn, for appellant.

Mason & Campbell, for appellee.

WALKER, J.—This is an appeal taken from the judgment of the District Court of Marion county, appointing Wm. H. Mason administrator of the estate of J. P. Brink. Brink died, leaving a widow and a family of children, a little more than four years prior to the granting of letters to Mason.

J. P. Brink left no separate estate, but a considerable community estate was left by him. C. E. Brink, the widow, assumed the control of the community estate under the act of 1856, but it appears has never filed an inventory of the estate.

Loyd is a creditor, and Mason also represents a debt against the estate of J. P. Brink. Loyd is endeavoring to reduce his claim to judgment against the widow representing the community estate, and in the absence of administration may gain advantage over other creditors; and we are not prepared to say that he is not entitled to this advantage by reason of his superior diligence. Be this as it may, we are of opinion that by the forty-fourth and forty-fifth sections of the general probate law of August 15, 1870, no letters of administration could be granted after four years had elapsed from the death of the intestate. Section 102 of the act declares, that before granting letters of administration it must appear to the court, among other things, that four years have not elapsed since the death of the intestate.

By Section 45 of the act it is declared, that after that time has elapsed the presumption is that there are no debts, or if any that they are debarred by the statutes of limitation, and that the property, if any, has gone into the possession of the person entitled to receive it.

The judgment of the District Court must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

G. W. GRANT v. BURLESON, PATTERSON & Co.

An obligation to pay a specified amount "in a good, solvent, cash note," becomes a moneyed demand for the amount mentioned, upon failure to deliver the note called for by the obligation within a reasonable time.

ERROR from Walker. Tried below before the Hon. J. R. Burnett.

Suit instituted in the County Court of Walker county by the defendants in error against the plaintiff in error on the instrument set out in the opinion. Judgment went against the plaintiffs in that case, because the instrument was sued on as a moneyed demand, and the value of the cash note, which was the primary element of the promise, was not alleged and therefore not proven. The case was taken to the District Court by appeal, where the petition was amended, and the value of a good, solvent, cash note, due the estate of A. G. Grant, deceased, on the twenty-third of November, 1861 (date of note sued on), alleged to be $217.87, and prayed for judgment for that amount, with interest. Judgment was rendered against them in the District Court, from which they appealed to this court. In this court the judgment of the District Court was reversed and judgment rendered here for $217.87, with interest. On application for rehearing in this court the judgment was reformed by remanding the case, instead of rendering judgment. The case came on for trial again in the District Court at the July term, 1872, when judgment was rendered for the plaintiff for $407.43, the amount specified in the instrument sued on, with interest.

Abercrombie & Banton, for plaintiff in error, cited Ward & Martin v. Latimer, Bagby & Co., 2 Texas, 245; 4 Texas, 385; Smith v. Falwell, 21 Texas, 466; Traynham

v. Jackson, 15 Texas, 170; Hamilton v. Calhoun, 2 Watt's Pennsylvania Reports, 140; 15 Maine, 470; 20 Id., 325.

Baker & Maxey, for defendants in error.

WALKER, J.—This case was before us at the last term, and we might perhaps be justified in saying that everything now before us worthy of consideration is *res judicata*. In Ward & Martin v. Bagby & Co., 2 Texas, 249, Judge Lipscomb, in delivering the opinion of the court, where suit was brought on the following instrument: "One day after date we promise to pay Latimer, Bagby & Co. $464.29 in cash notes, due since the first day of January, 1845, for value received of them," held that a promise to pay "in cash notes" is not equivalent to a promise to pay the nominal amount in money.

In a suit upon a note payable in cash notes, the value of the notes must be ascertained before a judgment can be rendered.

In the case at bar suit was brought on the following note:

"MEMPHIS, Nov. 3, 1861.

"I hereby promise to pay Mrs. Martha Wallace $217\frac{87}{100}$ in a good solvent cash note, due the estate of A. G. Grant, deceased, to count interest from the first of September last."

We held that on failure to deliver the note called for by this instrument within a reasonable time, it became a moneyed demand, and as such the holder might sue upon it. This ruling in nowise interferes with that of the case referred to in 2 Texas. We make the same ruling now, and therefore affirm the judgment of the District Court.

AFFIRMED.

ISAAC McGARY'S EXECUTOR v. A. W. McKENZIE ET ALS.

1. The liability of an endorser on a promissory note falling due in 1862 or 1863 was fixed by the institution of suit in 1865, at the second term of the court held after the courts were opened by the proclamation of Provisional Governor Hamilton, and by showing good reason for not bringing the suit the term before.
2. The liability of the endorser under such circumstances is not affected by the fact that the holder could have fixed his liability at an earlier day by demand, protest and notice.

APPEAL from Madison. Tried below before the Hon. James R. Burnett.

J. H. Banton, for appellant.

Baker & Maxey, for appellee.

WALKER, J.—The only question presented on this record is as to the liability of an endorser on promissory notes falling due on the first of January, 1862 and 1863. This suit was brought on the twenty-seventh of November, 1865, by McGary against McKenzie as maker, and Conner as endorser. The question here presented has so often been discussed and decided in this court that we deem it unnecessary to elaborate an opinion. We think that this suit was brought in time to fix the liability of the endorser under our statute. If the suit was not brought to the first term of the court after the courts were opened by the proclamation of Provisional Governor Hamilton, it was brought to the second, and a sufficient reason shown for not bringing it to the first.

The case is certainly settled. (See Smith v. Herbert, 30 Texas, 69; The Endorsement Cases, 31 Texas, 694; Hargraves v. De Lise, 32 Texas, 177; Porter v. Buckholts, 32 Texas, 487; Brooks v. Breeding, 32 Texas, 757.) But it

Argument for the appellants.

is contended in this case that the liability of the endorser might have been fixed by demand, protest and notice, and not having been so done, the endorser is discharged.

The case of Brooks v. Breeding, 32 Texas, 757, settles this question. It is there held that the holders of endorsed notes which matured prior to the act of the eleventh of January, 1862, could fix the liability of the endorser only by suit. One of the notes sued on in this case matured before the eleventh of January, 1862, while the courts were closed. After the passage of the act referred to, the holder had two modes of fixing the liability of an endorser—by notice and protest, or by suit, within the provision of the statute; and the endorser cannot complain of the mode selected.

We think the judgment in this case is erroneous; it is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

R. B. JOHNSON ET AL. v. R. J. CALDWELL ET AL.

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86 491

Though one who purchases real estate at a sheriff's sale, made after the term to which the execution is returnable, where no writ of *venditioni exponas* has issued, acquired no title, yet, if there be no fraud in the purchase, he will not be compelled to restore the property until he is reimbursed the amount paid by him, and which went to discharge the judgment.

APPEAL from Fannin. Tried below before the Hon. W. H. Andrews.

The evidence in this case shows that the sale was made by the sheriff, after the term to which the execution was returnable, but under a levy made before the term. No writ of *venditioni exponas* was applied for.

S. B. Maxey, for appellants.—I had thought this was not an open question. (Wheaton v. Sexton, 4 Wh., 503;

Ayres v. Duprey, 27 Texas, 593.) "The purchaser depends upon the judgment, the levy and the deed, and all other questions are between the parties to the judgment and the officer." (Brooks v. Rooney, 11 Ga., 423, evidently drawn from Wheaton v. Sexton.) An inspection will show a valid judgment, a valid execution and a valid levy made prior to return day, and I submit that the law is with the appellants.

H. S. Bennett, for appellee.—We regard the principle to be elementary that to acquire a good title to land at sheriff's sale, there must be a valid judgment, execution, levy and sale, and that a writ of *venditioni exponas* is an execution, and so regarded in law. (Towns v. Harris, 13 Texas, 507; Lockridge v. Baldwin, 20 Texas, 103; Young v. Smith, 23 Texas, 600.)

The writ of execution emanating from a valid judgment is the only authority for the sheriff's action, and even collection of money after the return day of the execution will not bind the securities on the sheriff's bond. (Borden v. McKinne, 4 Hawk's Law and Eq. Rep., 282.)

Hamilton v. Ward, 4 Texas, 356. In this case the sheriff levied the execution upon the lands in controversy, but not in time to sell the same before the return day of the execution, and proceeded to sell said lands without an alias execution or *venditioni exponas* being issued by the District Court, which sale was without authority of law, and vested no such title in plaintiffs as will enable them to maintain this action.

WALKER, J.—This is an action of trespass to try title. The plaintiffs claim under a sheriff's deed made in pursuance of a sale which it is claimed was irregular and void.

The sheriff levied on the property, but suffered the execution to become dead in his hands before making a sale. A term of the District Court having intervened, the sher-

iff proceeded to sell without an execution, or *venditioni exponas*.

In Towns v. Harris *et al.*, 13 Texas, 507, it was held that a sale of real property made in this State after the return day of the execution, was void.

So far as any title to the purchaser is concerned, we hold the same doctrine; but in Howard v. North, 5 Texas, 290, the court, in treating a case of this kind, held that where a sale on execution under a valid judgment is void, and the debtor brings suit to recover the property, if there is no fraud on the part of the purchaser he will not be compelled to restore the property, without being reimbursed the amount which he paid, and which went to discharge the judgment.

This, too, is an equitable doctrine of the law, and we think should be carried out in this case.

We have not thought it necessary to lay down this rule in Grace v. Garnett, for the reason that in that case there are evidently strong presumptions of fraud in the sale, if indeed any sale were made, which is not shown by the constable's return.

The court properly ruled out the sheriff's deed in this case, but as we think without protecting the appellants' equitable right to recover back the purchase money in the absence of any proof of fraud in the sale.

The judgment is therefore reversed and the cause remanded, to be proceeded in, in accordance with this opinion.

REVERSED AND REMANDED.

F. G. ROBERTS v. A. G. FRISBY.

A postnuptial obligation executed by the husband for the use of the wife, to pay money in consideration that the wife would live with him, cannot be enforced.

Statement of the case.

APPEAL from Walker. Tried below before the Hon. J. R. Burnett.

Randolph & McKenney, for appellant.

Baker & Maxey, for appellee.

WALKER, J.—I do not know how far a husband would be morally bound by a postnuptial contract in which he hires his wife to live with him; but the legal obligation cannot be recognized in this court. Roberts sues Frisby on a note calling for $1500, which upon its face is a good note; but the evidence shows that the note was intended to compromise a difficulty between Frisby and his wife; that he owed her nothing; that Roberts is her brother, and that the note was for the use of the wife; that if anybody has a right to it, it is his wife, who, though living apart from him, is still his lawful wife. We do not think there is anything in the errors assigned in this case.

The judgment is therefore affirmed.

AFFIRMED.

ANNA HILL v. SOLOMON FAIRFAX.

The 27th Section of Article 12 of the Constitution of 1869 confers on those negroes who had lived together, while in slavery, upon the terms and under the conditions described in that section, marital rights and legitimates their offspring.

APPEAL from Harris. Tried below before the Hon. James Masterson.

The appellee obtained a verdict in the court below under the following instruction, viz.: * * * "If plaintiff and defendant, both being negro slaves, lived together during slavery after the manner of man and wife among slaves, but were not, after emancipation, married

or agreed to marry, followed by actual marriage, then such previous cohabitation was not, under the law, legal marriage. If the relation which existed between plaintiff and defendant was meretricious, then no right of property could begin or arise out of that relation; no length of cohabitation in condition of concubinage constitutes marriage."

Crank & Wilson, for appellant.

John H. Duncan and *Manly & Masterson*, for appellee.—Suppose that issue are born of the mere lascivious connection of a free white man and a bond woman becoming free. He then disclaims the illegal and unnatural connection and takes an honest colored woman in lawful marriage, and issue are born. Without the *bona fide* relation of "husband and wife," in substance if not in form, here insisted upon, the concubine or the mistress and the illegitimate children would exclude the lawful wife and legitimate children.

Suppose, again, he prefers to take a white woman in lawful marriage and issue are born. Still the concubine or the wanton and the bastard progeny would exclude the lawful wife and the lawful offspring.

This reasoning would equally apply to slaves exclusively, becoming free. They, too, might change their mode of life, form a lawful connection, have children, and then bear the same fatal results. For example, the case at bar.

These consequences might be traced *ad infinitum*, until collectively they would appall the devil himself.

It has been contended, somewhat boldly, that the provision of the Constitution does not apply to cases where both parties were slaves, however confidently assumed. The ground seems to be that the only preclusion of "the rites of matrimony" was an express statutory enactment,

but that that precluded the white and the free from "the rites of matrimony," with the black and the slave. Therefore the former were alone precluded; therefore the provision, moving upon a preclusion of matrimonial rites, contemplates the former only; therefore the free white man and the slave can alone enforce its obligations, or claim its benefits.

The provision moves only upon that class of cases. But if this be so, the provision does not and cannot apply to the case at bar, both being slaves. This point is respectfully submitted to the consideration of the court.

WALKER, J.—The facts in this case appear to be about these. Both the plaintiff and defendant in the court below were negro slaves until the date of general emancipation, and belonged to Chas. Shearn.

Sometime in the year 1865 they commenced living together as man and wife, holding themselves out as such, and being so known and recognized among their friends. They continued to live in this state until the month of December, 1869. In the latter part of the month of December the appellee abandoned the appellant and married another woman.

The property in controversy appears to have been acquired during the time the parties lived together as man and wife. The appellee took the title to both the lots in his own name. They improved the lots and lived upon them until about the time of the abandonment, and it does not appear to have been the intention of the appellee to deprive the appellant of the use of the property, even when he abandoned her.

We think the evidence shows that the appellee would be entitled to an equitable division of the property, if the law established no relation between the parties other than that which exists among strangers, as it is pretty clearly

established that at least the second lot purchased was purchased and improved with the joint earnings and means of both the parties; but if the facts shall be found to bring this case within the provision of the twenty-seventh section of the twelfth article of the Constitution, then the appellee will be entitled to the same interest in the property that other married women take in the property acquired by themselves and husbands during coverture, under the laws of this State. We think the charge of the court is erroneous, and does not fairly state the law of the case. What a jury would understand by an actual marriage between the parties, without the proper explanation, is not what the Constitution in the clause referred to contemplates. It was no doubt intended by the framers of that law to confer marital rights, and legitimatize the offspring of persons who had lived together upon the terms and under the conditions described in the section referred to. The interpretation which this court has placed upon the twenty-seventh section of the twelfth article of the Constitution was not known to his honor the District Judge before whom this case was tried, at the time it was tried, else it would have relieved him from any embarrassment growing out of this novel feature of our fundamental law. (Clark's Heirs v. Honey, 37 Texas, 686.)

Actual marriage, as heretofore understood, is not necessary to entitle a woman to the rights of a wife, whose case falls within the provision of our Constitution on this subject.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

Galveston, Harrisburg and San Antonio Railway Company v. The State of Texas.

The eleventh section of the act supplementary to the act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company, passed July 27, 1870, construed in connection with the twelfth section of the charter of the International Railroad Company, does not exempt the first mentioned corporation from the payment of taxes to the State.

Appeal from Harris. Tried below before the Hon. James Masterson.

No briefs on file.

Walker, J.—This is an action brought in the name of the State against the appellant for taxes admitted to be due and unpaid, and the only question which the appellant brings to our attention, on which a reversal is claimed, grows out of the eleventh section of the special act of reincorporation, passed July 27, 1870, and the twelfth section of the charter of the International Railroad Company, passed August 5, 1870. The title of the act of July 27, 1870, is as follows: "An act supplementary to the act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company." The eleventh section of the act reads as follows: "That said new company shall be entitled to the same or similar rights and relief, except State aid in bonds or endorsement of or guarantee of interest on bonds, granted to or provided for any other railroad company by the Legislature, and upon the same or similar terms and conditions, so far as such rights or relief are in their charter applicable to said new company or its line or lines of railroad."

It appears from the twelfth section of the act incorporating the International Railroad Company, that the Legislature has relieved that company from the payment of

taxes for the period of five years, but it does not follow, from anything which appears upon this record, that the appellant is entitled to the same relief, and we think it very questionable whether the Legislature can enact a law which is to be changed in its nature and provision by any subsequent act of legislation, and by any subsequent Legislature which may relate to subjects not at all contemplated in the appellant's charter. In other words, could the Twelfth Legislature, by virtue of the promise contained in the eleventh section of appellant's charter, bind the State to confer upon this company any and every chartered right and privilege which future Legislatures may see proper to confer upon other railroad corporations?

We do not think, by any possible construction of these two acts which this court would be authorized to give them, that the appellant is entitled to any immunity from taxation.

The judgment of the District Court is affirmed.

AFFIRMED.

CHARLES A. WARREN, ADMINISTRATOR OF J. S. T. GREEN, v. WALLIS, LANDES & CO.

1. A partner has no separate and exclusive right to any portion of the partnership assets, and the creditor cannot execute and sell the interest of one partner as a separate interest while the undivided interest may be reached in equity.
2. The ownership of one partner in the property of the firm is subject to the like ownership of all the partners who hold subject to each other's ownership.
3. An attachment will not lie against the common property of a copartnership for the separate debt of one of the partners so long as the partner is indebted to his firm, or the firm indebted to third persons.

Statement of the case.

4. In a suit by a creditor of one partner to subject the partnership assets to the payment of his claim, the *onus probandi* is upon the plaintiff to show that the defendant has an interest in the assets over and above his debts to the firm, and the debts of the firm to third persons.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

Wallis, Landes & Co., plaintiffs in a suit against Oscar Sullivan, procured an attachment to be levied May 11, 1869, on certain goods and merchandise in the sutler's store of Sullivan & Green, to the extent of an alleged half interest therein, claimed by them to be in the defendant Sullivan. The undivided half value of the goods was shown by the sheriff's return to amount to $951.99—the whole amounting to $1903.98. On the ninth of December, 1867, J. S. T. Green filed his claim to the goods, "in his individual capacity, and as a partner of the said firm of Sullivan & Green," together with the statutory affidavit and bond.

Green dying, the case was continued from term to term until his administrator was made a party. Wallis, Landes & Co. joined issue with the claimant by their answer. A trial was had, resulting in a verdict for the plaintiffs, subjecting the property to the levy of the attachment.

The cause was submitted to a jury under the following instruction, viz.: * * "It is incumbent on the claimant to show, from the state of the partnership account, that Sullivan would not be entitled to receive anything on the settlement of the partnership affairs, or not so much as claimed by plaintiffs, before he can defeat their levy in whole or in part. The settlement of Green and Sullivan of their partnership affairs, if made subsequently to the day of attachment, could not prejudice the rights of the plaintiffs on the attachments, their rights depending altogether upon the state of the partnership affairs at the date of levy of the attachment."

Verdict and judgment for plaintiffs. Error in the charge was relied on in motion for new trial.

McLamore & Hume, for appellant. — The court instructed the jury in effect that plaintiffs need make no proof of any facts but those of debt and partnership, and that they must find for them, unless claimant made out affirmatively the absence of any interest in Sullivan. This error seems to us so grave as to demand a reversal of the case. The court should so have defined partnership liabilities as to embrace in those terms the debts due by Sullivan & Green to Green. (Collier on Partnership, §§ 166, 822. See also Austin v. Talk, 20 Texas, 166–7; Shropshire v. Doxey, 25 Texas, 128; and Chamberlain v. Tarbox, 27 Texas, 146.)

Mann & Baker, for appellees.—If appellant was not satisfied with the charge of the court, it was his duty to ask counter or proper charges, or except to those already given. This he did not do, and he cannot now, for the first time in the appellate court, object to the charge of the District Court.

"Objections to the charge of the court below to the jury should be taken in the court at the trial, and the proper charge asked then." (28 Texas, 55–6; Ib., 134; 26 Texas, 748; 14 Texas, 16; Ib., 30.)

"If the defendant's counsel wish the instructions of the judge to the jury on any point, which was omitted in the charge, his course was to suggest the point, and have an opinion on it." (16 Texas, 387; 11 Wheat., 276.)

Again, exceptions to charge of the court must be taken on the trial, or they will not be considered by the appellate court. (3 Texas, 400; 14 Texas, 16; Ib., 30; Ib., 592.)

WALKER, J.—This is an action to try the right of property. Jacob S. T. Green in his lifetime was a partner with

Oscar Sullivan in the sutler business. Sullivan owed an individual debt to Wallis, Landes & Co., the appellees, who sued out an attachment in the District Court of Galveston county on the eleventh day of May, 1869, and caused it to be levied on the sutler's store of Sullivan & Green, to the extent of one-half the amount of the goods. Green claims that his partner, Sullivan, had no interest in the goods at the time, that they had lost money by their business, that Sullivan was behindhand with the firm, and that their stock on hand was not sufficient to pay the partnership debts and Sullivan's debt to the firm.

It is a principle of law well settled that an individual partner has no separate or exclusive right to any part or portion of the partnership assets rather than to any other part or portion. The partners have a common interest in all the assets. No one partner being allowed to claim a separate interest, it follows that his creditor cannot execute and sell a separate interest, whilst the undivided interest may be reached in equity.

The ownership of one partner in the property of the firm is subject to the like ownership of all the partners, who hold subject to each other's ownership.

Parsons says, in his work on Partnerships, "It must be remembered, not only the ownership of each partner is subject to the ownership of all the others, but that all the partners together hold the property subject to the right and obligation of the partnership, as a body *per se*, to apply all its funds to the payment of all its debts." (See Washburn v. The Bank of Bellows Falls, 19 Vt., 299.)

This being the law, an attachment could not lie against the common property for the separate debt of one of the partners, so long as that partner is indebted to the firm, or the firm indebted to third persons.

Opinion of the Court.

This case has been twice tried by a jury, the appellees recovering in both instances. For this we are unable to account, for the evidence does not show that Sullivan had one dollar of interest in the partnership stock that was not necessary to pay his own debts to the firm of Sullivan & Green, or to pay the debts of the firm.

Counsel appear to have understood the manner in which this case should be tried.

The onus was on the appellees of proving that Sullivan had an interest in the stock, over and above his debts to the firm, and the debts of the firm to third persons, and by consent of counsel the case was so tried below, the appellees taking the opening and closing. But the court did not instruct the jury as to the proof necessary to entitle the appellees to recover; the charge virtually relieved the plaintiff below from making any proof, necessary to entitle him to recover.

The obvious import of the charge was that Green, the claimant of the property, must make out affirmatively the want of any interest in Sullivan. The truth is, the evidence does make this out by an overwhelming preponderance, and we can only account for the verdict upon the supposition that the jury was misled by the charge. A verdict so manifestly against the evidence should not only be set aside once, but as often as may be necessary in order to reach the ends of justice.

It was error to overrule the motion for a new trial.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE MERCHANTS' MUTUAL INSURANCE COMPANY v. J. H. BROWER & CO.

1. The plaintiff suggested the death of a non-resident defendant and obtained an order for *scire facias* to his representative. The clerk afterwards issued citation to the defendant for publication, which was returned by the sheriff as "received on the eighteenth of September, 1871, and executed on the twentieth of September, 1871, by causing its publication," etc. At a subsequent term the suggestion of death was corrected on ascertaining the defendant was still living. *Held*, that the court had acquired no jurisdiction over the defendant.
2. Stock in a corporation is not subject to attachment.

ERROR from Galveston. Tried below before the Hon. A. P. McCormick.

The opinion contains a statement of the case.

Ballinger, Jack & Mott, for plaintiff in error.—We submit that the citation against Jenny was wholly without legal authority. If a party alleges and the court pronounces a party dead and orders process to his legal representative, surely its clerk is not a functionary *ex mero motu*, without suggestion to the contrary in the records, to correct the error of the court. Process is grounded on the allegations of the pleadings, unless there be orders of the court, which, of course, control the clerk of the court; and to recognize in the clerk of the court a power by issuing a citation for publication to acquire jurisdiction over a party pronounced by the court to be dead would be the grossest absurdity. (Ward v. Latimer, 2 Texas, 245.)

The return of the sheriff does not show publication of citation to Jenny. The return is that he received the citation on the eighteenth of September and executed it on the twentieth by causing its publication for four weeks "prior to returning thereof." *Non constat* that it was published at all. Causing it on the twentieth, two days

Argument for the defendant in error.

after its receipt, to be published four weeks was a physical impossibility. He could bargain for it, order it, but the publication was a future event. Return that the sheriff had ordered publication and printer's affidavit of publication insufficient. The sheriff must officially state the actual fact of publication. (Goodlove v. Gray, 7 Texas, 484; Blossom v. Letchford, 17 Texas, 649; Edrington v. Allsbrooks, 21 Texas, 186.)

Stock in a corporation is not subject to attachment. (Haley v. Reed, 16 Ga., 437; Nashville Bank v. Ragsdale, Peck's R., 296; Hayne v. Stockweather, 17 Mass., 240; Foster v. Potter, 37 Mo., 525.)

Our acts alone recognize the attachment of "property" (Dig., Arts. 138 to 155), and choses in action or stocks cannot be attached or sold under execution. The question is carefully settled in an opinion by Chief Justice Hemphill, in Price v. Brady, 21 Texas, 614; reaffirmed by Judge Wheeler in Taylor v. Gillean, 23 Texas, 514, 515, and in other cases.

Flournoy & Sherwood, for defendant in error.—It is claimed, first, that the clerk issued citation without authority and without jurisdiction, and when the record showed the defendant to be dead. To this we answer, that the clerk but did his duty under the law, and was bound to issue the citation, and could have been compelled to do so had he refused; while the suggestion of the death of the defendant was shown to be a mistake, and duly corrected before judgment. We submit that the record shows a legal citation by publication.

If the defendant had property in the county, then the court had jurisdiction. If the defendant, Jenny, had property, these defendants, as plaintiffs, had the right to sue out the attachment.

The citizen may have service by publication or attach-

ment. (Ward v. Lathrop, 11 Texas, 287; Butterworth v. Kinsey, 14 Texas, 500.)

And the non-resident is entitled to the same privileges as the citizen, where there is property of defendant. (Ward v. McKenzie, 33 Texas, 313.)

In Paine v. Moreland, 15 Ohio, 435, the court say: "A court acquires jurisdiction by its own process. If the process of the court be executed upon the person or thing concerning which the court is to pronounce judgment, jurisdiction is acquired. The writ draws the person or thing within the power of the court; the court once having, by its process, acquired the power to adjudicate upon a person or thing, it has what is called jurisdiction.

It has been always held that a garnishee cannot reverse a judgment on account of mere irregularities in the proceedings in the main action. They affect only the defendant, and he alone can take advantage of them. (Drake on Attachment, § 697; Stebbins v. Fitch, 1 Stewart, 180; Parmee v. Bullard, 3 Stewart, 326.)

Walker, J.—There are several interesting questions involved in this case, but they are all so well settled upon authority and by statute, that we shall endeavor to arrive at a solution of the case without discussing them *seriatim*.

The defendants in error are non-residents of the State. They sued C. H. Jenny, also a non-resident, in the District Court of Galveston county for a balance on account of about $3000. Jenny, it appears, owned stock in the Merchants' Mutual Insurance Company, which had its locus in Galveston. Suit was commenced by attachment, the stock in the company was levied upon, and the company garnisheed.

An affidavit was made setting forth that Jenny was a non-resident, and that he owned assets in the county of Galveston.

The attachment was levied on $2500 stock in the insurance company.

Application was also made for the writ of garnishment (not under oath), which stated that the company had effects and credits in possession belonging to Jenny. The writ was issued to the Merchants' Mutual Insurance Company, John S. Sellers, President, calling for an answer under oath, and Sellers was served with a writ.

On the twenty-first of June, 1869, a supplemental petition was filed, alleging the seizure of $2500 stock in the Merchants' Mutual Insurance Company, by the sheriff's return worth only $700. An alias attachment was issued and levied on personal property claimed by Fanny Watson, who intervened.

At the March term the death of Jenny was suggested, and the cause continued for service. At the September term, without setting aside the suggestion of the death of Jenny, after order for *scire facias* formally obtained, the clerk issued a citation, by publication, for Jenny, demanding his appearance. The writ is returned by the sheriff as received on the eighteenth of September, 1871, and executed on the twentieth of September, 1871, by publication.

At the November term the cause is again continued for service. At the March term, 1872, the suggestion of Jenny's death was withdrawn, as having been made by mistake. The cause was then submitted to a jury. The jury found in favor of Fanny Watson for all the property levied on under the alias attachment, and also found for the plaintiffs against Jenny a verdict for over $4000. The court entered the judgment, and ordered the sale of the stock in the insurance company. On the sixteenth of April, the insurance company not having answered the writ of garnishment, a judgment was taken against it for the whole amount of the judgment against Jenny.

There is error throughout these proceedings. The court never had jurisdiction of the defendant Jenny; no valid judgment could be rendered against him, and none could follow against the garnishee without it. Stock in a corporation is not subject to attachment. (Haley v. Read, 16 Georgia, 437; Nashville Bank v. Ragsdale, Peck's Reports, 296; Hayne v. Stockweather, 17 Mass., 240; Foster v. Potter, 37 Mo., 525; Price v. Brady, 21 Texas, 614; Taylor v. Gillean, 23 Texas, 514, 515.)

The judgment must be reversed and the cause dismissed.

REVERSED AND DISMISSED.

WILLIAM CHRISTIAN & CO. v. C. BUNKER, JR., AND J. C. HOADLEY.

B. executed a deed of trust conveying his steam mill, situate on land which did not belong to him, to C., who gave his consent for the removal of the old engine; a new portable steam engine was placed in the mill by B., who had purchased the same from D., under an unrecorded contract that it should remain the property of D. until paid for: *Held*, that until paid for the new engine was not subject to sale under the deed of trust.

APPEAL from Harris. Tried below before the Hon. James Masterson.

On June 13, 1871, appellee, Bunker, by his agent, purchased of Hoadley, the intervenor, a portable steam engine, No. 917, in Massachusetts, paid $1266.66 on the same, and gave his note for the balance, $2607.21, and they executed an agreement in substance that the engine was delivered to Bunker for use, but was to remain the property of Hoadley until the note was paid. This agreement was never recorded.

On June 20, 1871, Bunker executed a deed of trust to

Argument for the appellants.

appellants on his steam saw-mill and all its appurtenances, to secure a note for $3000, which deed of trust was duly recorded June 23, 1871.

About the time the deed of trust was given Bunker told appellants that the engine then in the mill was too small, that he was going to put in a larger engine, and thereby appellants' debt would be the better secured, and that he would then want to sell the old engine and would want them to release their lien on that.

The new engine (purchased from Hoadley, intervenor) arrived at the saw-mill in August, and in November the old one was taken out and the new one put in. In February following Bunker sold the old engine, and appellants released their lien on that (as was previously agreed upon, whenever the new engine was put in), and the greater part of the proceeds—$750 out of $858—was paid to appellants on their note.

Afterwards, on August 8, 1872, the mill and all its appurtenances, except this engine, was destroyed by fire.

Four days after the fire appellants brought this suit to foreclose their deed of trust on the saw-mill and its appurtenances, or what was left of it, including the new engine, No. 917. Hoadley intervened, claiming that the engine was his, and contesting the lien claimed thereon by appellants. Judgment was rendered by default against Bunker for balance due on his note, but the lien was denied upon the engine, and the same was decreed to belong to Hoadley, intervenor.

From so much of the judgment as denied appellants' lien on the engine, and decreed the same to the intervenor, this appeal was taken.

Crosby & Hill, for appellants.—It has been repeatedly held that a steam engine, erected for the purpose of furnishing the motive power of a manufactory, is to be re-

garded as a fixture; or in other words, as a part of the manufactory itself. (Aves v. Ogilsby, 7 Watts, 106; Winslow v. The Merchant's Ins. Company, 4 Met., 306; Alison v. McCune, 15 Ohio, 729; 11 Barbour, 43; 3 Harris, 507; 28 Maine, 545; 29 Id., 115; Gardiner v. Finlay, 19 Barbour, 317; Brennan v. Whitaker, 15 Ohio St., 446; Butter v. Page, 7 Metcalf, 40.)

Apply this principle to the case at bar and it seems conclusive that when the engine in controversy was put in the mill it became a part of it, as a fixture, and that the lien of plaintiff's deed of trust attached to it, although of prior date, and takes precedence over the intervenor's claim, which, though prior in point of time, was never recorded.

Winch & Whitfield, for appellee.—To enable appellants to recover, portable engine No. 917 must, first, have belonged to Bunker and not to Hoadley; second, must have been a fixture and attached to the realty; third, advances must have been made upon the faith of that engine as security by Christian & Co; and fourth, it must have been part of the mill at the time the deed of trust was executed.

The negative of each and all of these propositions is the truth, as shown by the evidence.

WALKER, J.—On the thirteenth of June, 1871, Bunker made a conditional purchase from Hoadley of steam engine No. 917. Their contract was made at Lawrence, Massachusetts. The engine was delivered to Bunker in August following, for use, at his mill at Harrisburg, Harris county, Texas. The agreement between Bunker and Hoadley was never recorded.

On the twentieth of June, 1871, Bunker mortgaged his mill and fixtures, with the engine then in the mill, No.

443, to the plaintiffs. The mill itself was not a fixture, the land on which it stood not belonging to Bunker.

The old engine was taken out of the mill, and the new one put in. That the appellants claimed the old engine on the fourteenth of February, 1872, is evidenced by the following instrument:

"MR. CHARLES BUNKER: You are hereby authorized to make sale of your Hoadley engine, without regard to our lien, by virtue of deed of trust of yourself to J. H. Crosby, trustee, dated November 20, 1871, for saw-mill appurtenances; the proceeds of said sale being paid over to us, and endorsed on your note of that date for $3000.

"Yours, etc., "WM. CHRISTIAN & Co."

There is a manifest error in date of the deed of trust referred to in this letter. It should be June 20, instead of November. The old engine was sold for $858—$750 of which was paid over to Christian & Co.

It is now contended by the appellant that the deed of trust to Christian & Co. became a lien on the new engine paramount to any right of Hoadley. This cannot be the case. The new engine was a portable engine. The mill itself was not a fixture to the land, nor did the engine become such. Hoadley's right to the engine is paramount.

The judgment of the District Court is right, both in law and equity, and is affirmed.

AFFIRMED.

LEWIS, KATE, SUE AND THOMAS H. BALL v. JAMES A. HILL, ADMINISTRATOR DE BONIS NON OF ESTATE OF T. H. BALL.

1. Where the answers of a witness are not full in response to a cross-interrogatory, which seeks to explore the source of his knowledge about the fact testified to, his testimony, if admitted at all, should be with great caution to the jury.

Statement of the case.

2. The possession of a non-negotiable note without a written assignment is not evidence of ownership; the holder must show that he is the *bona fide* owner, and the manner in which he became such.

APPEAL from Walker. Tried below before the Hon. J. R. Burnett.

The appellee filed an application in the District Court of Walker county on the eleventh day of July, 1871, alleging that he was the holder and owner of a note, executed by his intestate on the sixth day of August, A. D. 1856, to W. A. Leigh, for two thousand dollars, due on the first day of January, 1857; that said note was by said Leigh transferred to J. C. & S. R. Smith, and by them to appellee; that said note was, after being duly authenticated, allowed by W. F. Perrie, former administrator of said Ball's estate, on the first of February, 1859, and said allowance was approved by the chief justice of Walker county on the fifteenth day of September, 1860; that it was given to secure so much of the purchase money of two and three-fourths acres of land adjoining the town of Huntsville, with the improvements thereon; and prayed that notice be given, and that said land be sold to satisfy said note and interest, less certain credits endorsed on it. The appellants, most of whom were minor children of said Ball, answered that the property sought to be sold was the homestead of T. H. Ball at his death, and that they still occupied it. They denied all the allegations in said Hill's application, and averred that if the note was given for the land no lein was reserved, and, if reserved, it had been waived. Appellants filed written motion to suppress depositions of J. C. Smith. 1. "Because he had not fully answered cross-interrogatory propounded by them, to-wit, 'Do you know the fact of your own knowledge, or did you learn it from some else; if so, of whom?'" * * * This motion the court overruled. Appellee introduced deed from Leigh and wife to

Ball to the land, of same date of the note, which acknowledged the receipt of $4000, the entire consideration of the land. The appellants asked the court to give the following, among other charges, which was refused, viz.:

1. "That the note produced in evidence in this cause is not negotiable, and possession of it by J. A. Hill is no evidence of ownership; you will therefore find for defendants, unless said Hill has proven that the note was assigned to him, or that he paid a consideration for it."

There was a verdict and judgment for appellee.

Randolph & McKinney, for appellants.—The refusal to give the first special charge asked by appellants was manifest error, for which alone the cause ought to be reversed.

In the cases of Merlin v. Manning, 2 Texas, 351; Ross v. Smith, 19 Texas, 171; and Merrill v. Smith, 22 Texas, 53, it is held, that the possession, by a third party, of a non-negotiable note, without written assignment, is no evidence of ownership; and that the holder of such an instrument, in the lifetime of the maker, might be permitted, at common law, to bring the suit in the name of the payee, to plaintiff's use, and, in equity, to bring suit in his own name; but in the event he resorts to his equitable action (as appellee did in this cause), he must aver and prove that he came *bona fide* into possession for value.

The effect of the decree of the court below, as it now stands, is to take from the heirs of T. H. Ball the homestead which he and they had held peaceable possession of, under a deed which recited the payment of the purchase money, for more than sixteen years, and give it to the appellee, who never had a shadow of title to it, and who never proved, or even averred, that he ever paid one cent for it.

Abercrombie & Banton, for appellee, cited Mundy v. Able, 19 Texas, 213; McAlpine v. Burnett, 19 Texas, 500.

WALKER, J.—This is an action brought by the administrator *de bonis non* of Ball's estate against his heirs to turn them out of his homestead by virtue of a real or pretended vendor's lien claimed by the plaintiff to secure a note for $2000 given by T. H. Ball, deceased, on the sixth of August, 1856, to W. A. Leigh, and due one year from date.

The suit was filed on the eleventh of July, 1871. The plaintiff claims to be the owner and holder of the note. The note was transferred by Leigh to J. C. & S. R. Smith, and was allowed as a claim against the estate of Ball by W. F. Perrie, a former administrator, and the allowance was approved by the chief justice on the fifteenth of September, 1860. The appellants, most of whom appear to be minors, deny all the allegations in the plaintiff's petition, and aver that if the note formed any part of the consideration for the property in question, no lien was reserved.

The deed from Lee to Ball acknowledges the receipt of $4000, the consideration named. The first error in the proceedings of the District Court to which our attention is called, is that of overruling the exception to the deposition of J. C. Smith, and it does appear to us that if this deposition were admitted at all, it should have been under great caution to the jury. The witness does not answer the cross-interrogatory as to how he obtained the knowledge of the facts to which he testified, but his answers raise the presumption that his evidence was not derived through T. H. Ball, the only source which could have made it competent in this case. His statements consisted rather of deductions made in his own mind, or impressions for which he does not satisfactorily account.

Syllabus.

We think the court erred in refusing to give the first special charge asked by the appellants. The production of this note was no evidence of ownership in J. A. Hill, and it was necessary for him to prove that the note had been transferred to him for a valuable consideration. (See Merlin v. Manning, 2 Texas, 351; Ross v. Smith, 19 Texas, 171; Merrill v. Smith, 22 Texas, 53.) The possession of a non-negotiable note, without a written assignment, is not evidence of ownership. The holder of such a note, at common law, might sue in the name of the payee for his own use, or he might sue in equity as in this case in his own name, and prove himself the *bona fide* owner for a valuable consideration.

In a case like this the plaintiff must prove that he is a *bona fide* owner, and the manner in which he became such. The note in this case, by the allowance of a former administrator, and the approval of the probate judge in 1860, became a quasi judgment against the general assets of the estate of T. H. Ball, and should have been paid in due process of administration; and it is very doubtful whether, after so great a lapse of time, a court of equity will allow even a *bona fide* holder and owner of the note to change the form of the remedy and proceed in equity to sell the homestead of minor heirs.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

JESSE THOMPSON v. W. O. BOHANNON.

1. It is error to join in the same action a note payable to the plaintiff in his individual capacity and one payable to him in a fiduciary capacity.
2. Executory contracts made by guardians, executors or trustees, and payable in Confederate notes, may be enforced for the use of the beneficiaries,

Statement of the case.

but the defendant may reduce the recovery to the actual value of the property or other consideration for which the obligations were given.

3. It is error to render judgment by default final for the alleged value of a contract payable in Confederate bills; proof should be introduced of such value.

4. A judgment upon a contract on its face payable in Confederate bills may be enjoined even after twelve months from the date of the judgment.

ERROR from Fort Bend. Tried below before the Hon. L. Lindsay.

The two cases, numbered 1223 and 1224, constitute but proceedings in the same case.

Suit was brought by the defendant in error, Bohannon, on two notes payable to him, one as guardian of Walter Jones, the other to him individually, both payable in Confederate bills of "the new issue," and signed by Jesse Thompson, H. C. Thompson and John M. Weston. It was alleged that the Confederate States bills were worth five per cent. of their face value, and that sum was claimed.

Weston pleaded misjoinder of causes of action and the illegality of the notes. The Thompsons did not answer.

On the trial in November, 1870, the defense of Weston was sustained, but the plaintiff recovered judgment by default for $355.

From this judgment Jesse Thompson prosecuted his writ of error, and the case is No. 1223.

In January, 1872, Jesse Thompson filed his petition for injunction restraining the collection of the judgment, and obtained a temporary injunction.

At the March term, 1872, the court dissolved the injunction and dismissed the bill, which action is brought by writ of error before this court, and is No. 1224.

The facts appear in the opinion of the court.

P. E. Pearson and *Gustave Cook*, for appellant, cited 33 Texas, 350, Lobdell's Administrator v. Fowler; 33 Texas, 630, Brown v. Read; 34 Texas, 220, Fox v. Wood.

Opinion of the Court.

R. J. Calder, for defendant in error.

WALKER, J.—There is a motion filed in this court to consolidate these two cases and have them considered together. In No. 1223 suit was brought in the District Court on two promissory notes. One of the notes was given to William Bohannon, guardian of Walter Jones, for the sum of $2400. The other note was given to the plaintiff in his own right, for the sum of $2000. Both the notes were to be paid in Confederate money of what was called new issue. The notes are signed by Jesse Thompson, H. C. Thompson and John M. Weston. The plaintiff, in his petition, does not seek to recover the face of the notes, but alleges his right to recover the value of the notes in coin, which he avers was five per cent. of the whole amount called for.

The defendant Weston filed an answer, and plead in abatement the misjoinder of causes of action; and also set up the illegality of the notes.

The judgment of the court was in favor of Weston; but the Thompsons having failed to answer, the court entered a judgment by default against them for the sum of $355, being five per cent. on $4400, with interest added. This judgment was temporarily enjoined by the plaintiff in error, but the court, on a motion, dissolved the injunction.

We think the cases are wrongly numbered in this court. No. 1224 should be numbered 1223, and 1223 should be numbered 1224; and we shall treat them under these numbers as corrected.

The court erred in entering a judgment on the two notes. The causes of action were improperly joined. The plaintiff was suing on the one note in his own right, and on the other in the right of the guardian of Walter Jones. Under the decisions of this court, repeatedly announced, he

could not recover on the note given in his individual right; but the court has also held that he might recover on a fiduciary contract.

But the frequent occurrence of suits of this kind by administrators and guardians has led us, after much deliberation, to reconsider our former rulings. It has not unfrequently occurred that sales of property made by administrators and guardians during the war, for Confederate money, would now, if the purchasers of such property should be compelled to pay their purchases in current funds, work gross injustice. The case at bar presents a forcible illustration. The amount of the note was $2400 in Confederate money; in coin, the plaintiff himself says, it was $161. It does not appear to the court what was the consideration of this note; but according to the plaintiff's own account of it, the note was worth but $161 in coin.

We therefore propose to take this case as the foundation for the rule that, in all actions on contracts made by administrators, trustees and guardians, for Confederate money, whilst such contracts may be enforced for the benefit of heirs, legatees, devisees, and creditors, it will be competent for the defendant to show the actual value of the property sold or the consideration of the contract, whatever it may be, and the plaintiff shall not be allowed to recover more than a fair consideration for the contract, in current funds, at the time it was made, with lawful interest.

The honorable judge of the District Court, we think, erred in rendering a judgment by default against the plaintiff in error, on the notes sued on. It is true that the Thompsons made no defense to the action, but the plaintiff was bound to show substantively to the court that he had a good cause of action before he was entitled to any judgment. In this case his petition showed clearly that he had no cause of action growing out of the $2000

Syllabus.

note, and he had no cause of action in his own right growing out of the $2400 note.

In the injunction suit, No. 1224, the court erred in dissolving the injunction. (32 Texas, 129, Cook v. Burnham; 34 Texas, 220, Fox v. Woods.) It matters not that the injunction was sued out after the expiration of the twelve months. It was a judgment enforcing written contracts for Confederate money, as apparent on the face of the notes themselves.

In No. 1223 the judgment of the District Court will be reversed and the cause dismissed, without prejudice to an action on the note given to the guardian of Walter Jones, to be proceeded in, in accordance with this opinion. In No. 1224 the judgment of the District Court is reversed, and there being now no judgment to enjoin, the cause will also be dismissed at the cost of the defendant in error.

REVERSED AND DISMISSED.

W. H. SHEARON v. TRAVIS HENDERSON, GUARDIAN, ETC.

1. Suit may be maintained on an obligation payable in Confederate notes by an executor, administrator, guardian or other trustee, for the use of the benificiary, but the defendant may reduce the amount to the *value* of the consideration of the obligation sued on upon alleging and proving such value.
2. *Lis pendens* is notice of the matters in litigation, but only such as appear in the pleadings.
3. It is error to instruct the jury that dealings between father and son are badges of fraud.
4. A precedent debt even barred by limitation may form a consideration for the conveyance of property, and if adequate in amount and the transaction be otherwise in good faith, the sale will be supported.
5. The fraudulent intent of the vendor in no way affects the title of the *bona fide* purchaser, and it is error to instruct the jury that the validity of a sale is dependent upon the intent of the vendor.

Statement of the case.

APPEAL from Lamar. Tried below before the Hon. A. H. Latimer.

On the seventeenth day of September, 1863, Samuel Hancock and Wm. H. Shearon executed their note, for property purchased at an administrator's sale, to W. B. Wright and L. Yates, administrators of the estate of John D. Thomas.

The note was not paid at its maturity, and on December 11, 1865, suit was brought against the makers of the note, Samuel Hancock and Shearon, by Richard J. Thomas, guardian of the minor heirs of the said John D. Thomas. In the subsequent proceedings the appellee, Travis C. Henderson, succeeded as guardian.

On April 9, 1867, affidavit and bond for attachment were filed, and on the eleventh of April, 1867, a levy of the attachment was made upon 359 acres of land. This land defendant Hancock had transferred to his sons, John M. and Martin H. Hancock, on the twenty-fifth of March, 1867. These vendees were made parties defendant.

The defendant, Samuel Hancock, pleaded general denial; that the note was given for property bought of W. H. Shearon at administrator's sale, and that defendant was surety; that the note, by the express agreement of the parties thereto, was payable in Confederate bills; that the property for which the note was given was worth, in coin, but one-sixth the amount for which the note was given; that the defendants had tendered the Confederate States bills at maturity, etc.

Subsequent to the levy of the attachment plaintiff amended and alleged that the sale of the land levied on was fraudulent, without consideration, and for the purpose of defrauding creditors, etc.

John M. and Martin H. Hancock answered, that they had bought and paid for the said land, had received possession of it from their father, Samuel Hancock, prior

to the levy of attachment, and that the purchase was in good faith, and that they had conveyed the land to one Louisa Hancock.

By amendment they set out the particulars of their purchase, and showed indebtedness to each from their father, liquidated by the transaction.

Shearon adopted the defenses of defendant, Samuel Hancock.

On the trial the court instructed the jury (touching the sale of the land) as follows:

"The suit of the plaintiff pending at the time of the sale made by Samuel Hancock to J. M. and Martin H. Hancock is constructive notice to them of the indebtedness of said Samuel Hancock to the plaintiff.

"Dealings between father and son, when the party conveying is heavily involved in debt, is suspicious, and is regarded in the eye of the law as a badge of fraud or a presumption of fraud."

The court refused to submit the question of "Confederate money" to the jury.

Verdict was rendered for the full amount of the note, and that the conveyance from Samuel Hancock to his sons, J. M. and Martin H. Hancock, was fraudulent.

Judgment was entered for the amount of the note and for sale of the property seized by attachment, and releasing defendant, Samuel Hancock, on his discharge in bankruptcy.

Motion for new trial was overruled, and the defendant appealed to this court.

The defendant, Samuel Hancock, went into bankruptcy on March 10, 1868. The plaintiff obtained orders from the United States Court in Bankruptcy to prosecute the suit to judgment.

Samuel Hancock was discharged under the bankrupt laws on November 1, 1869.

The other facts sufficiently appear in the opinion.

S. B. Maxey, for appellant, cited Smith v. Nelson, 34 Texas, 516; Miller v. Sherry, 2 Watt., 237; Carrington v. Brent, 1 McL., 167; Edmonds v. Crenshaw, 1 McCord, 264; Leland v. Wilson, 24 Texas; Wood v. Colvin, 5 Hill, 230; Catlin v. Jackson, 8 Johns., 546; Kent v. Roberts, 2 Story, 603.

W. B. Wright and *Hancock & West*, for appellees, cited Hamilton v. Pleasants, 31 Texas, 638; Trammell v. Philleo, 33 Texas, 395; Wright v. Linn, 16 Texas, 43; Briscoe v. Bronough, 1 Texas, 335; Gibson v. Hill, 23 Texas, 82; Green v. Banks, 24 Texas, 519; Edrington v. Rogers, 15 Texas, 188; Mosley v. Gilmer, 10 Texas, 397; Parks v. Atkinson & Chappell, 36 Texas, 16; Tutell v. Turner, 28 Texas, 777; Morgan v. Johnson, 15 Texas, 369; Hill v. Cunningham, 25 Texas, 32; 2 Story Eq., §§ 105, 106; 2 Vesey, 194; 2 Johns. Ch., 366.

OGDEN, J.—This is an action upon a promissory note given for the purchase of property at an administrator's sale in 1863. The first question presented in the record which requires notice is the defense that by an express agreement the note was to be paid in Confederate money, and therefore illegal and void. This defense has been held, in repeated decisions by this court, to be as a general rule a complete bar to an action. But an exception to this general rule has been recognized, when a party brings suit in a fiduciary capacity, and when the real parties interested cannot be chargeable with a participation in the illegality of the contract. This doctrine was clearly announced in Hamilton v. Pleasants, 31 Texas, 641, which has been closely followed in Trammell v. Philleo, 33 Texas, 395, and in Morgan v. Benson and several unpublished decisions.

Under the rule laid down and followed in those cases, an administrator or executor who sued as such, or other person suing in a fiduciary capacity, could maintain a suit and recover judgment in legal currency on a note or other contract payable in Confederate money, for the full amount of such note or other contract. It is believed this court has uniformly held to this rule since the close of the late war, whenever the question was properly presented for decision, excepting in the case of Smith v. Nelson, 34 Texas, 520, when the general rule, and not the exception, was recognized as the law; but the court is now unanimous in the opinion that there is an error in that case, caused probably by an unintentional oversight of the character in which the plaintiff below brought that suit, and that the same should not be regarded as authority.

In view of the injustice which may result to parties who have purchased property at administrators' and executors' sales, and sales made by persons acting in a fiduciary capacity, with the distinct understanding and agreement that such contracts of purchase, etc., were to be discharged in Confederate money, and thereby were induced to agree to pay for such property a greater sum or price than it was worth in lawful money, this court, in the case of Thompson v. Bohannon, decided but a few days ago, so changed the rule heretofore adhered to, as to allow the defendant in such cases, under proper pleadings, to allege and prove the actual value, in lawful currency, of the property or other consideration for which the note or other contract was executed; and to restrict the plaintiff in his recovery to the actual value thus proven.

On the trial of the case at bar, there was proof going to show that at the sale of property for which the note sued on was given, it was the understanding and agreement

that the note was to be paid in Confederate money; and that in consequence the property brought a price greatly in excess of its actual value; and no notice was taken of this fact in the charge of the court to the jury. But it is due to the court to say that the charge in this respect was in conformity with the former rulings of this court. It is believed that justice requires this case should be sent back for a new trial, that the jury may be properly instructed in this respect, in accordance with the rulings in Thompson v. Bohannon.

There is error in the second charge of the court to the jury, where it says, the suit of "plaintiff, at the time of the sale made by Samuel Hancock to J. M. & M. H. Hancock, is constructive notice to J. M. & M. H. Hancock of the indebtedness of Samuel Hancock." We think this is carrying the doctrine of *lis pendens* to an extent not authorized by the authorities. Where suit is brought for the recovery of, or in relation to, a specific property, or right in equity, that suit may operate as constructive notice to all the world of the claim set up in relation to the particular property or equity; but such constructive notice is not to be extended beyond the immediate subject matter of the suit. (Edmonds v. Crenshaw, 1 McCord's Ch. R., 264; 2 Johns. Ch. R., 158.)

This suit was originally brought on a simple note of hand, and the suit most certainly could not operate as constructive notice of anything not set up or claimed by the plaintiff. At the time of the sale of the property in controversy by Samuel to J. M. and M. H. Hancock, there was no pretense of a claim for anything but the money due on the note, and particularly none upon the land sold, and we have been unable to discover any principle of law or equity which would prevent Samuel Hancock from selling the land, or J. M. and M. H. Hancock from purchasing, provided the sale was *bona fide*, and

for an adequate consideration. That sale might have been for the express purpose of raising funds to pay the note sued on. There can be no doubt that the parties had a right to sell and purchase the land in question at any time before the levy of the attachment, if the transaction was untainted by fraud.

We think the subsequent clauses of the charge also erroneous. The sale of property by the father to the son, or by the son to the father, cannot in itself be considered as a badge of fraud. That fact, in connection with the indebtedness of the father and other circumstances, might very properly have been submitted to the jury for their consideration in determining the question of good or bad faith. The father may have been involved, and may have sold to his sons in perfect good faith, notwithstanding they had full knowledge of his embarrassment, and, therefore, neither of these facts can properly be considered as badges of fraud.

The instructions also give too great a prominence to the intent of the father in making the conveyance to his sons. If the father was justly indebted to his sons at the time of the sale, and if they purchased, at full consideration, with the sole object and purpose of securing their debt, then it was quite immaterial whether they knew of his embarrassments or not, and it would also be immaterial what was the intent of the father.

It is an elementary principle that a person in failing circumstances may prefer one creditor to another, and may prefer relatives or sons to strangers. There can be no doubt that Samuel Hancock had full power and right to sell the land in controversy to his sons at the time he executed the deed, provided the sale was made *bona fide*, for a fair consideration paid, or made in liquidation of a previously existing debt, and the sale would be equally good and binding whether the debt was barred by limit-

ation or not. The only inquiry which need be made in that respect is, was there a pre-existing debt, and had it ever been paid?

The statute does not compel a party to accept the benefits which would arise from limitation unless he chooses so to do; and though a debt may have been barred for years, yet it may, under our statute, be revived by a simple acknowledgment and payment or promise to pay in writing. The main questions for the jury in this cause were in relation to the intent of the parties in the sale of the land. If the sale of the land was made to J. M. and M. H. Hancock for the purpose of paying a pre-existing debt due from the father to the sons, and if in the purchase by the sons they paid an adequate consideration—and further, if that sale was made to the sons before the levy of the attachment, then their title is complete, beyond the reach of the plaintiffs below by means of this suit; and the intention of Samuel Hancock to hinder and delay his creditors, so far as this land is concerned, cannot affect the vested rights of the sons. Nor would the knowledge on the part of the sons that the father was in debt, and that the sale to them would hinder and delay creditors, affect their title, if their object in making the purchase was to protect their own interest and secure their debt.

But if the objects of the father and sons in making the transfer of the land were to cover up and conceal the real title, and thereby hinder and delay the creditors of Samuel Hancock, then the whole transaction was fraudulent, null and void, and the sons now have no right to complain of the verdict rendered by the jury. There is, however, an error in the verdict of the jury in finding for the plaintiffs and against Samuel Hancock for the amount of the note and interest. His discharge in bankruptcy has freed him from all responsibility in relation to his former debts.

We do not propose to notice at this time the other questions presented in the plea of discharge in bankruptcy, since the questions already noticed must settle the rights of the parties now litigating. This appeal is brought here by J. M. and M. H. Hancock, and if upon a new trial the jury render the same verdict rendered on a former trial, that will settle the whole case so far as appellants are concerned. But should the jury on another trial find that J. M. and M. H. Hancock were purchasers in good faith, then the questions of bankruptcy will no longer have any prominence in the case.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

THE PLANTERS' MUTUAL INSURANCE COMPANY v. S. LYONS, LINDENTHAL & CO.

1. A policy of insurance contained, among other stipulations, the following, viz.: "If the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * then, and in every such case, this policy shall be void." The agent of the company was informed by the assured that additional insurance had been obtained. *Held*, that it was the duty of the company, upon being notified of the additional insurance, to have endorsed the same upon the plaintiff's policy, or notified the insured of the refusal of the risk, and that, having failed to do so, it is estopped from setting up as a defense that such additional insurance was not endorsed on the policy.
2. An agent of an insurance company authorized to make and revoke contracts of insurance, is the proper person to give consent to the procuring of new insurance, unless his powers be restricted by the company in this respect, and the insured have notice of the restriction.
3. Where a party has, by his representations or conduct, induced the other party in a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he cannot be permitted to avail himself of that advantage.

Statement of the case.

4. Insurance companies doing business through agencies at a distance from their principal places of business, are responsible for the acts of their agents within the general scope of the business with which they are entrusted, and no limitation on the authority of the agent will be binding on the parties with whom he deals, unless such limitation be brought to their knowledge.

APPEAL from Harris. Tried below before the Hon. James Masterson.

Suit by the appellees to recover $6000 gold on a policy of insurance (No. 12) upon a stock of goods in Waco, insured 13th of August, 1870. The goods were destroyed by fire on the eighth of April, 1871. The appellants' defense rested mainly on the ground that the appellees had procured other and additional insurance without the written consent of the appellants. The policy contained, among other stipulations, the following, viz.: "If the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * * then, and in every such case, this policy shall be void." The application for the policy, made a part thereof, stated the value of the stock on hand on the thirteenth of August, 1870, at $12,000 gold, and the average stock at $10,000. The appellees, by amended petition, alleged that after procuring the policy they went to the general agent of the defendants, E. A. McKinney, and informed him of their desire to increase their stock of goods, and to procure other insurance; that McKinney, acting as such agent, and with full power, * * "did advise and assist plaintiffs in getting the other insurance, and did then and there, to-wit, about January, 1871, deliver to one of these plaintiffs a certain written advertising card of Massie & Herndon, insurance agents, at Galveston, Texas; and did then and there write upon the back of the same as follows, viz.: 'Frame range; now insured for $6000, at four per cent.; average stock

$12,000. Lyons will select company, and I will make application.

(Signed) "'E. A. MCKINNEY.'"

The appellant filed a plea under oath denying that such written consent to procuring other insurance was ever given by appellant or by its authority, and alleging that McKinney was not the general agent of appellant, and had no power to give such consent. Flint & Chamberlain, who had been the agents of the company, notified it a year or more before the issuance of this policy that they could not attend to the business, and would have to give up the agency at Waco. To this Longcope, secretary of the company, replied that he would be pleased to have the benefit of their name as advertising agents, and requested that they would designate some reliable person who would do the work for the pay, and that Flint & Chamberlain need to be at no trouble except to sign papers as agents. McKinney was thereupon appointed. Flint & Chamberlain still remained agents, but McKinney was to do the work and correspond directly with the company, to save F. & C. trouble, as far as possible.

On the tenth of February, 1871, appellees procured on their goods in Waco additional insurance, in the Liverpool and London Globe Insurance Company, for four thousand dollars. McKinney testified that he signed the paper above referred to, having reference to additional insurance, and after being notified that such insurance had been obtained, believed that he wrote to his company, saying, "No. 12 has additional insurance; what are your orders?" or to that effect.

McKinney also testified that when Cohen told him that additional insurance had been obtained, he (McKinney) informed him that he would refer the matter to the home office for instructions, and thereupon Cohen asked his opinion as to what the company would do. It appears

from the testimony of one of the appellees that he knew of no other agency for appellant in Waco than McKinney.

McKinney also testified that he was not the agent of the appellants, though he corresponded directly with the company to save circuity of reporting business to Flint & Chamberlain, and they to the company; that he kept policies in blank, signed by the president and secretary, and that he made to the company monthly returns, embracing an account-current and an abstract of policies issued, none of which were signed, but the name of Flint & Chamberlain written in the heading. Their receipt was always acknowledged.

Longcope testified that the correspondence of the company was mostly had with McKinney; that he made monthly reports and held blank policies; but that no knowledge of additional insurance by appellees was had by the home office until after the fire.

The court gave to the jury, among others, the following instructions, viz.:

"4. A principal is liable for the acts of his agents done within the scope of his employment. A general agent, notwithstanding private instructions, may, within the limits of his agency, bind his principal, unless the person dealing with the agent knew of the instructions. A particular agent (by which is meant one authorized to do one or more special things) binds his principal only so far as he pursues his authority. The rule is, as to the public, that the authority of a general agent may be regarded by them as measured by the usual extent of his general employment; but, as to acts of particular or special agents, the rule is different; a principal may well say to one who dealt with an agent for a particular purpose (special agent), it was your business to first ascertain for yourself the character and extent of his agency.

Statement of the case.

"By accepting the policy sued on, plaintiffs are bound to know of the terms and restrictions therein contained.

"5. As to the nature and extent or limitations on the authority of McKinney, you are to find, from all the evidence before you, taken together and carefully compared. If, from the evidence, you are satisfied that he (McKinney) had the authority to act as the general agent of defendant company, and that, within the scope of such agency, he was authorized to receive notice of additional insurance in other companies, and did, in fact, receive such notice, then such notice was notice to the defendant.

"If, from the evidence, you find that McKinney's agency was only to procure risks and take premiums, and then deliver policies, his agency would, in that event, be a particular, as contradistinguished from a general, agency; and, in that case, his authority would not extend to waiving any of the terms of the policy.

"It is the duty of the holder of a policy of insurance to inform the company or its agent of any change of the status of the thing or risk; in like manner, it is his duty, within a reasonable time, to duly notify the company in which the first policy was taken out of any additional security by additional insurance, in order that said company may inquire into the solvency and standing of the companies, which, in case of loss, must share such loss.

"7. Where it is in evidence that the insured obtained further insurance in other companies contrary to the stipulations of policy sued on, such policy was vitiated.

"By the terms of the policy sued on, consent in writing on the policy itself is requisite; but if such consent in writing were in fact given by the defendant company, or by some agent who had the authority to give such written consent, and if plaintiffs, after obtaining additional insurance in other companies, they having previously notified the agent, who, according to the terms of his agency, was

charged with the duty of receiving such notice, then such written consent is binding upon the company; but the burden of proof is upon plaintiffs, and plaintiffs must satisfy the jury by proof that McKinney did give the written consent, after he was informed of the amount of additional insurance, the company in which such additional insurance was so obtained; and furthermore, plaintiffs must prove that McKinney had the authority to give such consent. No presumption of such authority arises, but such an authority must be proved by plaintiffs."

The following charges, asked by appellees, were given by the court, to-wit:

"1. That the matter of McKinney being the agent of defendants, is a question of fact for them to determine from the testimony, and in aid of their investigation they are instructed that an agent may be created by long acquiescence on the part of the principal, with knowledge of his acts as agent for said principal, as well as by express appointment; and that if by express agreement it is so arranged between parties that one shall be advertised as the agent, but that another shall actually do the business, and this third person does transact the business, and becomes known as the agent of the principal by transacting their said business, then the said third person is their agent, and the principal is estopped from denying it as to those who have acquired rights against said principal because of the acts of said agent.

"2. A corporation cannot affirm an act of its agent in part, and disaffirm as to the residue. And the defendants herein are not to be allowed to avail themselves of the benefits of McKinney's acts, wherein they enure to their benefit, and to ignore and disaffirm the acts of said McKinney when they may operate to their prejudice, provided he has acted within the scope of such agency.

"3. When there is no evidence of the written appoint-

ment of an agent, the fact and extent of his agency must be determined by what he testifies and did, and also by the acts of the company recognizing him. If either party must suffer from the mistake of an agent, it must be the party whose agent he is.

"4. If the plaintiffs procured the written permission of the agent to get other insurance, and the agent neglected to endorse the same on the policy, or inform the company, then the plaintiffs cannot be affected by such neglect.

"If such agent had authority to give the permission, which is a fact for the jury; and thus qualified I give this charge in connection with the charges of the court.

"5. If the jury believe that the company have given its written consent to plaintiffs to get other insurance, and that such writing has been lost or mislaid by the agents of the defendants, and without any fault upon the part of plaintiffs, then the plaintiffs ought not to suffer thereby."

Verdict and judgment for appellees.

Gray & Botts, for appellant.—We do not, and never have at any time, contended that McKinney's acts were not valid as an agent of any character. The company has never denied his acts as a special agent under Flint & Chamberlain, who were also special agents, to receive applications, take premiums and risks. No such denial was made before or after suit. But the issue was, whether he had general power, or had acted as general agent, or agent of any sort, to consent to additional insurance, which was recognized by appellant. That was the first issue, and upon that we say the testimony was not only insufficient, but the verdict was found without evidence to support it, and palpably against the evidence introduced and relied on by appellees.

Take all the evidence together, and there is no ground for the pretense that McKinney was general agent, or agent of any sort, authorized to consent to other insurance, nor that appellees ever had reason so to suppose, or that they ever acted on such belief. Yet the court charged the jury in such a general and special mode on that subject, that they could not help thinking that the judge thought there was strong evidence tending to that conclusion.

A verdict found without evidence, or palpably against evidence, will not be allowed to stand in this court. (Kellum v. Smith, 18 Texas, 849–850.) The same doctrine is held in Green v. Hill, 4 Texas, 465; and Shropshire v. Doxey, 25 Texas, 127.

The very language of Justice Wheeler, as to insufficiency of proof of fraud to support a verdict, may be used as to the want of evidence of agency of McKinney in this case. We say then there was error in the court, both in submitting that issue to the jury in the general and loose manner it did, and also in refusing the new trial.

It will not do to answer that the court gave the charges asked on this question by appellant, contradictory to those given *mero motu*, and also specially at request of appellees, nor on any other question where contradictory charges were given. Such contradictions do not give the law, which is the rule of action for the jury, but only give a conglomeration of inconsistencies, from which the jury are to select by lot, perhaps, or, at best, by exercising their judgment, which was to be taken as law. This of itself was error.

"The court must instruct the jury as to the legal effect of evidence," when it is documentary. (San Antonio v. Lewis, 9 Texas, 71; Weir v. McKee, 25 Texas, Sup., 31; 1 Bouvier Law Dict., title Construction, § 8.)

"A charge which is in the alternative, and allowed the jury to presume the grant merely because one of the parties claimed the land, is erroneous." (Grimes v. Bastrop, 26 Texas, 314.)

The general doctrine is assumed and discussed in Howard v. Davis, 6 Texas, 180; Dunlap v. Wright, 11 Texas, 602.

The court then should have plainly and positively instructed the jury whether the alleged consent, written in pencil, on an insurance agent's advertising card, was the formal, deliberate and binding consent of the company, or of its supposed agent, required by the policy. Was it, indeed, anything approaching such consent, or even a substitute for that consent required? That patent medicine card of "Massie & Herndon, Insurance Agents, Galveston, Texas," when endorsed by McKinney "in pencil," figures somewhat in this case as a lamb of sacrifice for the sins of the immaculate appellees—a scapegoat by which they seek to be saved from all losses, real or pretended, and to cast them on a corporation whose real officers or agents never heard of it!

If, then, McKinney was agent, for any purpose, is it not manifest that he did not consent, by that card? It seems to us idle to pretend such a construction, and we will not waste further time on the question. Yet the judge gravely submits the question of written consent, actually given, to the jury, both in his general and special charges; and in one of them goes so far as to suppose there was evidence of the loss or destruction of the written consent! Not only so, but that it had been lost by appellant's agent, Flint, and therefore that the appellees should not be the sufferers! Was there ever a charge given more grossly inapplicable to facts, or so sublimely persistent in assuming that there was evidence of the written consent required by the policy—the most material fact?

If we are right in this conclusion, it is needless to go further; for the jury must have been misled by the charge on this material point; and this is error, for which the verdict must be set aside. So say all the authorities, without contradiction. (Blanchet v. Davis, 3 Texas, 142; Bailey v. Mills, 27 Texas, 438; Ponton v. Ballard, 24 Texas, 621; Hollingsworth v. Holshousen, 17 Texas, 47, 48, and cases there cited; Chandler v. Fulton, 10 Texas, 22; Spence v. Onstott, 3 Texas, 147; Hancock v. Horan, 15 Texas, 511; Love v. Wyatt, 19 Texas, 316.)

We say, then, that there is not only no sufficient evidence to support the verdict on this subject, but that it was all the other way, clearly against the allegation of consent. Yet the learned court saw fit, by its charge and by giving special charges for appellees, to leave that question to the jury, in a manner calculated to make them believe that the judge cosidered the evidence sufficient to be left to their decision.

Where the testimony is all one way on an issue, it is error for the court to submit it hypothetically to the jury.

"A charge must not be in the abstract when not warranted by the evidence." (Thompson v. Shannon, 9 Texas, 537; McGreal v. Wilson, Id., 429; Wheeler v. Moody, Id., 372; Davis v. Loftin, 6 Id., 492; Hancock v. Horan, 15 Id., 507; Love v. Wyatt, 19 Id., 312; Hatch v. Garza, 22 Id., 187.

We grant it freely, that where a company allows a person to act for it as agent and recognizes his acts, holding himself out to the world as such, the company will be bound by his acts as such agent. This is the general principle asserted in all the books, no less than in the authorities of appellees. That is the way in which they have heretofore argued the case; but that is not the real question involved. The real question is this: 1. Can a special agent, known to be such, who is only authorized

to take risks and attend to such matters as relate to that branch of the business, give consent to additional insurance in another company? We say not, and defy the production of authority to the contrary.

"The act of an agent beyond the scope of his authority is not binding on the company." (Angell & Ames on Corp., §§ 297–299; Brooklyn Gravel Road Company v. Slaughter, 33 Ind., 185.)

An agent to receive applications, etc., is not authorized to accept notice of over-insurance or waive consequences of it. (Mitchell v. Lycoming Ins. Co., 51 Penn. St., 402; and Ins. Digest Agent, 361.)

Verbal notice of second insurance to an agent is not sufficient, where the policy required indorsement in writing. (Hutchinson v. Western Ins. Co., 21 Mo., 97; Fowler v. Agawam Mut. Ins. Co., 9 Cush., 470.)

Second insurance without consent avoids the first policy. (Insurance Co. v. Stockbower, 26 Penn. State, 199; Blanchard v. Atlantic Ins. Co., 33 N. Hamp., 9; Kimball v. Howard Fire Ins. Co., 8 Gray, 33; Hygum v. Etna Ins. Co., 11 Iowa, 21; Bigler v. New York Central Ins. Co., 20 Barb., 635; Battacle v. Merchants' Ins. Co. of N. O., 3 Robinson, 384.)

Equity requires him to let that stand as legally done, which, but for his acts or omissions of duty, would not have been done. The innocent party should not be allowed to suffer wrong.

Such is the doctrine of Herman on Estoppel, and of Bigelow on Estoppel, where they treat of *estoppel in pais*. And such is the doctrine so admirably stated by Lord Denman, in Pickard v. Sears, 33 Eng. C. L. R., 117, cited by Justice Lipscomb, in Love v. Barber, 17 Texas, 318; see, also, 2 Smith's Leading Cases, 7th Am. Ed., pp. 711–716; Duchess of Kingston's case, in notes by Hare & Wallace, where the court will find the whole sub-

ject more clearly, succinctly and logically treated than in either of the works on estoppel above cited.

We respectfully submit that in no respect have the essential facts been made to appear which would create an equitable estoppel, or any of the requisite grounds of that doctrine.

Stewart & Barziza, for appellees.—If Flint & Chamberlain considered themselves as the responsible agents of appellants, they must have a very loose way of doing business, because one of them did not know anything about the policy sued on, and the other did not care, as he says he signed the policy just as Mr. McKinney handed it to him. It will not do for the appellants, a public company chartered by the State, with extraordinary powers, to set up before the people a man of straw, and after inducing the public to deal with him as real, then to turn around and ignore his existence. An insurance company establishing a local agency must be held responsible to the parties with whom they transact business for the acts and transactions of the agent, within the scope of his employment, as if they proceeded from the principal. (Beebee v. Hartford Ins. Co., 25 Conn., 51; The Lycoming Ins. Co. v. Schollenberger, 8 Wright, 259; Beal v. The Park Ins. Co., 16 Wis., 241; Davenport v. Peoria Ins. Co., 17 Iowa, 276; Savings Bank v. Charter Oak Ins. Co., 31 Conn., 517; Horwitz v. Equitable Ins. Co., 40 Missouri, 557; Ayres v. Hartford Ins. Co., 17 Iowa, 176; The Howard Ins. Co. v. Bruner, 11 Harris, 50.)

The books all agree that not only is a written consent not required to be endorsed on the policy, but they agree that no written consent is absolutely requisite at all upon the ground of estoppel. (Herman on Estoppel, Secs. 539, 541, 548, 451, 555.)

From a leading case (12 Harris, 320) cited in Flanders

on Fire Insurance, p. 192, Chief Justice Woodward says: "No company has a right to select and send out agents to solicit patronage and business for its benefit, and then to saddle their blunders upon its customers."

As to the powers of appellants' agent at Waco, there is no evidence of any restriction of such powers, or of any special agency with which he was charged; and if he was held out as the general agent of appellants, with private instructions as to his powers, the public or a third party are not bound by such private instructions, unless notice is brought to them. (See Digest of Ins. Dec., p. 34, Secs. 7 and 9; p. 37, Sec. 20; p. 39, Sec. 28; p. 41, Secs. 36–7; p. 44, Sec. 43; p. 45, Secs. 46–7–8; p. 46, Sec. 52; p. 47, Sec. 54; p. 49, Sec. 63; p. 50, Secs. 64–5; Flanders on Fire Insurance, p. 157.)

And that McKinney was and ought to be deemed the agent of appellants, we refer the court to the express opinion of Mr. Justice Miller, 3 Wallace.

As to the powers of an insurance agent, we refer the court to the following authorities in Flanders on Fire Insurance, to-wit: pp. 42, 143, 51, 52, 56, 57, 157, 158, 159, 160, 164 and note, 165, 166, 170, 199.

Coming down as late as the year 1869, after the law upon fire insurance had been fully discussed and passed upon by courts in England and the United States, we find a case of Carrugi v. The Atlantic Fire Insurance Company, from 40 Georgia Reports, 135, and set out in 2 American Reports, 567, in which the identical point was made that is attempted to be made in this case.

It matters little to these appellees what private instructions were given their agents by appellant, or what powers the rules and by-laws of the company conferred upon an agent, because the appellees acted in good faith with the agent and representative of the company; and, in the language of a learned judge, quoted on page 199, in Flan-

ders on Fire Insurance, "It would, in my opinion, be little less than legalized robbery to allow these insurance companies to escape from liability upon the merest technicality possible, and that too, when created by their own by-laws, which remain a sealed book to ninety-nine out of every hundred persons insured."

It may be contended that the home office did not receive notice of additional insurance; but the appellees had nothing to do with that; they dealt with the company through its representative at Waco, and if such company at Waco failed to do its duty to itself, then surely appellees ought not to be blamed. If no fire had happened before the expiration of the policy sued on, we do not imagine that the appellant, in the fullness of its honesty and bounty, would have offered to refund to appellees any proportionate share of the premium paid, when they had learned at the secretary's office that the appellees had procured additional insurance. It will do very well, at this stage of the case, for the president and secretary to say they would "possibly" have canceled appellees' policy if they had been directly notified of the other insurance!

The truth is, according to the whole record, that the appellant is seeking to shield itself behind a mere technicality, and one, too, which the courts have always disfavored. In view of the whole case, we confidently ask the court to affirm the judgment of the court below, as there has been no error of which appellant can rightfully complain.

WALKER, J.—This is an action brought to recover on a policy of insurance for $6000, dated August 13, 1870. The appellees insured their goods in the town of Waco, in the company of the appellant, at a four per cent. gold premium. Stock consisted of clothing, boots, shoes and

dry goods. The insurance was under a continuing policy for one year.

As a part of the contract for insurance it is stipulated, "that if the insured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon," then the policy is to be void. This provision is customary in fire insurance policies, and the question it presents in this case is by no means new to the courts. But the facts are peculiar.

The appellant (defendant below) made two defenses to the payment of the policy.

A fire having occurred in April, 1871, by which the whole of the appellees' stock, amounting to some $12,000 or $13,000, was consumed, it was attempted in the court below to show that the appellees were responsible for the fire, and that the loss was occasioned through their fraud. That defense however is abandoned in this court, but it is here insisted, as it was below, that the policy is void by reason of the appellees having obtained an additional insurance on their stock of $4000 without the consent of the appellant, as stipulated in the policy. To this it is replied and insisted, that the necessary steps were taken, and the consent of the company virtually obtained to the additional insurance.

There is not much conflict in the evidence, and the main facts appear to be about these: Previous to the thirteenth of August, 1870, Flint & Chamberlain were the local agents of the appellant at Waco. Their business not permitting them to give the necessary attention to the agency, they had notified the managing officers of the company of a desire to surrender the agency. They were however requested by the officers of the company to refer them to a suitable agent who would "do the work for the pay;" and further, that they would allow

their names still to be used as the agents of the company, perhaps upon the ground that they were responsible business men and bankers in the town of Waco.

E. A. McKinney was recommended, and appears to have been thenceforward the active business agent of the company at Waco; and it is easily gathered from the evidence that no insurance was solicited, policies taken, reports made, or any other act of agency performed by any one acting for the company, in the town of Waco, except by E. A. McKinney.

Mr. McKinney states in his depositions that he corresponded with the company; made regular reports from his agency; received letters and communications from the secretary of the company. He filled out the policy in this instance, received the premium, and paid it over to the company, though it is true the names of Flint & Chamberlain are written on the margin of the policy, as agents. Yet it is insisted by the company that McKinney was only a special agent, with limited powers, not extending to the granting of the privilege to policy holders of taking additional insurance.

We confess there may be some difficulty in determining what was the precise relation of McKinney to the insurance company—whether he was but a *sub-modo* or special agent, without the necessary power of granting the license himself; yet we think, under proper instruction as to the law of agency, it was a question of fact for the jury to determine, how far McKinney was the agent of the company.

Lindenthal, one of the appellees, states that all the transactions in regard to the policy herein sued on were had with McKinney; that he paid him the premium; that he knew of no other agency in Waco for the appellant.

Regarding the status of McKinney as a question of fact, and considering him the agent of the company for

the ordinary transaction of its business at Waco, how does his conduct affect the law of this case? It is clear, from the evidence, that before the second insurance was taken in the London Globe Company, Lyons, the senior partner of appellees' firm, called upon McKinney, with the request that his firm might be allowed to make additional insurance on their goods; and we gather both from Lyons' and McKinney's evidence, that the matter was distinctly spoken of and understood by the perties; and, as a result of the interview, McKinney took a business card of Messrs. Massie & Herndon, insurance agents at Galveston, and wrote on the back of the card the following words and figures:

"Frame range; now insured for $6000, at four per cent.; average stock $12,000. Lyons *will select company*, and *I will make application.* MCKINNEY."

This memorandum is not dated; but by the testimony of Lyons, it was written about the nineteenth of January, 1871, and was intended to signify the assent of McKinney, that if Lyons would select a company in which to make additional insurance, McKinney would make the application for it.

Lyons obtained the additional insurance while in the city of New York, and it is furthermore testified by McKinney that Mr. Cohen, a member of the appellees' firm, informed him in February, 1871, that they had obtained an additional insurance on their goods; that he did not make any objection, but, as he believes, he informed the company—though upon this point the evidence is somewhat doubtful. There, however, can be no doubt that it was his duty to inform his company of so important a matter, and if he did—the fire not occurring until the eighth of April, 1871—the company had abundant time to act in the premises, and if the officers considered that the second insurance had been obtained without the

proper consent of the company, and that their policy was made void thereby, they should have so informed the appellees.

But it is insisted that the judgment of the District Court should be set aside for errors in the charge to the jury; that the charge is erroneous; that it improperly deals in abstractions and hypothetical cases.

We have examined this charge, and are not prepared, in our judgment, so to pronounce upon it. There is evidence in the case to which every part of the charge, as far as it could do good or harm, applies, and we find no misstatement of the law in it. Doubtless the charge might have been more brief, and quite as favorable to the appellees as it was. We admit the authorities to some extent hold that mere notice to an agent, without assent, of an intention to procure subsequent insurance, is not sufficient. (Kimball v. Howard Fire Insurance Company, 8 Gray, 33; Miller v. Hamilton Fire Insurance Company, 5 Duer, 101; Worcester Bank v. Hartford Fire Insurance Company, 11 Cushing, 265.) And it has also been held that mere verbal consent, when written consent is required by the by-laws of a mutual company, is not sufficient, even where the policy itself is silent on the subject. (Hale v. Mechanics' Mutual Insurance Company, 6 Gray, 169.) And in Dietz v. The Mound City Insurance Company, 38 Mo., 85, the court say "that stipulations as to consent for further insurance must be strictly complied with;" and it is further held, in some cases, that parol evidence of consent by the company is not sufficient where, by the policy, written consent is required.

But this question is left in some doubt; other courts have treated it differently, and we will proceed to refer to some of the arguments and adjudicated cases on the other side. Flanders, in his late valuable treatise on the law of fire insurance, says:

"If the insurer has actual knowledge of the existence of other insurance at the time he issues his policy, he will not be permitted to set up that fact to evade a liability which he has deliberately assumed." (p. 42.)

"And if the insurer, at the time he obtains his policy, informed the agent of the insurer that he already had other insurance, he will be entitled to recover in case of loss, notwithstanding the agent neglected to enter it in writing on the policy." (Page 43; see also, N. E. Fire and Mar. Ins. Co., 38 Ill., 166; Rowley v. The Empire Ins. Co., 40 New York, 557; Tallman v. The Atlantic Ins. Co., 40 New York, 87; Washington Ins. Co. v. Davidson, 40 New York.)

In the case of Howitz v. The Equitable Insurance Company (40 Mo.), the charter of the company contained a clause to the effect, "that if insurance on any house shall be and subsist in said company, or in any other company, at the same time, the insurance made in and by this company shall be deemed and become void, unless such double insurance subsist with the consent of the directors, signified by endorsement on the back of the policy, signed by the president and secretary."

The policy also in this case, like the one under consideration, contained a clause which provided, that if the insured should procure any other insurance, and should not, with all reasonable diligence, give notice to the company, and have the same endorsed on the policy, or otherwise acknowledged in writing, the policy should cease and be of no further effect. The application was for insurance to the amount of ten thousand dollars.

The agent of the company informed the applicant that by the rules of the company it could not take but five thousand dollars on any one risk, but, at the same time, offered to procure insurance for the remaining five thousand dollars. This the agent accomplished the next day

and notified the insured, who subsequently paid the premium and received his policy.

On this state of facts it was held to have been the duty of the company, upon being notified by its own agent of the additional insurance, to have endorsed the same upon the plaintiff's policy, or to have notified him of the refusal of the risk; and that having failed to do so, it was estopped from setting up as a defense the failure to have such additional insurance endorsed upon the policy. (Flanders, pp. 51, 52.)

And so we think in the case at bar. If the company were informed by McKinney that additional insurance had been effected on the appellee's goods, and the consent of the party was not given and endorsed on the policy, the policy should have been at once vacated, and the appellees notified.

Flanders, (pages 56, 57) says, "that when the contract of insurance is rendered void by reason of notice *not* being given of other insurance, and having the same mentioned in or endorsed upon the policy, it may be revived and rendered binding by subsequent acts of the insurers, manifesting an intention to treat it as a valid and subsisting contract, notwithstanding the forfeiture. And this right of waiver is not curtailed by an express provision of the policy that none of its conditions can be waived except in writing, signed by the secretary."

It is competent for the parties to rescind or modify this provision by a valid agreement, even by parol, and an executed agreement to renew the policy clearly has that effect. (See Carrol v. Charter Oak Insurance Co., 38 Barbour, 402; Dearborne v. Cross, 7 Cowen, 48; Carrol v. Charter Oak Insurance Co., 40 Barbour, 292.)

The case of Carrugi v. The Atlantic Fire Insurance Co., 40 Georgia, 135, is a case very similar to the one at bar, and the court hold in a very able opinion that "Where a

policy of insurance contained a clause that 'if any prior or subsequent insurance has been, or may hereafter be, made upon said property, and not consented to by said company in writing, this policy shall be null and void,' and the policy holder notified the agents of the company that he would get additional insurance and the agent consented, and the insured acted upon that consent and purchased the insurance, the first policy is not void, although the consent of the agent was not in writing.

"An agent of an insurance company, authorized to make and revoke contracts of insurance, is the proper person to give consent to the procuring of new insurance, unless his powers be restricted by the company in this respect, and the insured have notice of the restriction.

"Notice of an intention to get additional insurance and consent thereto by the agent of the company is sufficient, under the clause in this policy, to justify the insured in procuring the new insurance, there being no fraud. But if, after this new insurance is effected, the original policy be renewed, and no other notice in fact be given to the agent of the new insurance, the insurance will or will not be valid, according as, from all the facts and the conduct of both the insured and the agent, the jury shall believe it was or was not the intent of the insured to commit a fraud by over-insuring his property."

In the Insurance Company v. Wilkinson, 13 Wallace, 222, in the opinion by Justice Miller, the court hold: "That insurance companies, who do business by agencies at a distance from their principal places of business, are responsible for the acts of their agents within the general scope of the business with which they are entrusted, and no limitation upon the authority of the agent will be binding on the parties with whom he deals unless such limitation be brought to their knowledge."

If, then, there was any limitation on the authority of

McKinney to act as agent of the company in all matters pertinent to its business at Waco, the evidence does not show that the appellees had any knowledge whatever of the limitation, but, on the contrary, they deny that knowledge in their depositions.

Flanders also lays down the rule, "That a general agent for effecting insurance on behalf of the company has full power to insure, to renew, and to receive notice of other insurance," and cites Carrol v. Charter Oak Ins. Co., 40 Barbour, 292; Sheldon v. Conn. Mut. Life Ins. Co., 25 Conn., 207; New York Central Ins. Co. v. Nat. Pro. Ins. Co., 20 Barbour, 469; and Peck v. The New London Mut. Ins. Co., 22 Conn., 575; and the note on page 164 cites Farmers' M. F. Ins. Co. v. Marshall, 29 Vt.; and Mound City Mut. Fire and Marine Ins. Co. v. Curran, 42 Mo., 374, to the doctrine that the authority of a general agent is restricted to the range of his employment, and the acts and representations which an ordinary person might expect of him, and that he would be authorized to do or to make on behalf of his principal; and it is left as a question of fact for the jury, whether a given representation was really calculated to impose upon a careful and prudent man.

We think this question properly arose upon McKinney's memorandum on the back of Massie & Herndon's card.

It is in cases like this that Justice Miller says, "The courts of law and equity in modern times apply the doctrine of equitable estoppels to companies chargeable with notice through their agents; and the principle is, that where one party has, by his representations or his conduct, induced the other party in a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage."

Statement of the case.

These principles of the law were stated in the charge of the court below, with some unnecessary qualifications, which rendered the charge quite as favorable to the appellant as the current authorities would justify. But we think the jury understood the law of the case from the charge of the court, and that the verdict was quite consistent with the law and the facts; therefore, the judgment is affirmed.

AFFIRMED.

R. P. TENDICK ET AL. v. M. B. EVETTS ET ALS. J. Q. BROOKS AND JAMES CARLTON v. M. B. EVETTS ET ALS.

1. It is a recognized canon of construction of wills to ascertain the object, design, or purpose of the testator, by reason and consistency.
2. *Quære:* Whether the rule in Shelley's case is obligatory as applied to wills?
3. The manifest intention of the testator will control the rule in Shelley's case if in conflict with it.
4. Under a will which recites, "After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give and bequeath to, and dispose of as follows, to-wit, to my sister, Mary A. Stuteville," followed by a description of the property; after which, "And all the above described property I give and bequeath to the said Mary A. Stuteville, and her heirs, during her natural life," the devisee takes only a life-interest.

ERROR from Colorado. Tried below before the Hon. L. Lindsay.

This case (No. 750) was an action of trespass to try title, brought in the District Court of Colorado county at the Fall Term, 1869, by Milton Evetts, Susan H. Morehead, and her husband, William H. Morehead; Susan H., Polly A., Samuel S., Flint, and William H. Stuteville, minor heirs of Mary A. Stuteville, by their guardian, James C. Stuteville; Martha E. Webb, and Eliza John-

son, and her husband, Daniel Johnson; against Charles Schmidt and Robert P. Tendick, for a part of lot No. 4 in block No. 12, in the town of Columbus.

The plaintiffs claimed the property as heirs of Elizabeth J. Bond, deceased, who died April 25, 1857, leaving the property, by will, to Mary A. Stuteville, who died March 20, 1869.

The controversy is as to the construction of the following clause in the will of Elizabeth J. Bond: "After all my lawful debts are paid, I give and bequeath to, and dispose of as follows, to-wit, to my sister Mary A. Stuteville," which is followed by an inventory and description of the property devised; after which, "And all of the above described property I give and bequeath to the said Mary A. Stuteville, and her heirs, during her natural life."

At the Spring Term, 1870, James C. Stuteville, the husband of Mary A., deceased, and Amanda M. F. Portis, the sister of Elizabeth J. Bond, with her husband, C. D. Portis, made themselves parties plaintiff.

The defendants claimed the land by purchase at the administrator's sale of Reuben Bond (the husband of Elizabeth J. Bond), who had bought of the legatee and her husband, June 10, 1858. Elizabeth J. Bond, at the time of her death, had neither parents or children living, and the plaintiffs sought to recover on the ground that Mary A. Stuteville took only a life-interest in the property under the bequest. The facts, as alleged in the pleadings, were admitted by the parties on the trial, and a jury being waived, the court decreed that "the plaintiffs, Milton B. Evetts, William H. Morehead, and Susan H. Morehead, and C. D. Portis, and Amanda F. M. Portis, do have and recover of the defendants, Charles Schmidt and R. P. Tendick, three-eighths of the following described property."

Argument for the plaintiffs in error.

After describing the property, the decree proceeds:

"The said Milton B. Evetts being entitled to one-eighth, Wm. H. Morehead and Susan H. Morehead being entitled to one-eighth, and Amanda F. Portis and C. D. Portis being entitled to one-eighth, and the plaintiffs having admitted that the improvements placed on said premises are in excess of the value of the rents and profits, it is further ordered, adjudged and decreed by the court that the defendants are not entitled to the value of the excess of their improvements, and E. B. Obenchain, J. W. Middlebrook, M. W. Young, residents of Colorado county, are appointed commissioners to partition and divide the said property herein described among the plaintiffs and defendants in accordance with this decree, and they will report at the next term of this court how they have made said partition.

"And it is further ordered by the court, the plaintiffs, James C. Stuteville, guardian of the minors Samuel S., William H., Polly A., Flint and Susan H. Stuteville, Martha E. Webb, Daniel Johnson and Eliza Johnson and J. C. Stuteville, take nothing by their suit, and that the defendants do have and recover of said plaintiffs all costs of suit in their behalf expended; and it is further ordered, adjudged and decreed by the court, that the plaintiffs, Milton B. Evetts, William H. and Susan H. Morehead, and C. D. Portis and Amanda F. Portis, do have and recover of the defendants all costs of suit in this behalf expended."

R. V. Cook, for plaintiffs in error, contended for the application of the rule in Shelley's case in construing the will; that the limitation in the will to heirs gave Mrs. Stuteville a fee-simple title to the property, and that she, by the deed to Bond, conveyed a like title, citing 4 Kent, 215; 2 Jarmon on Wills (Perkins' edition), 176 *et seq.;*

Hancock v. Butler, 20 Texas, 807; Jarvis *et al.* v. Wright, 4 Hawks' N. C. R., 227; Choice v. Marshall, 1 Kelly, 97; Kay v. Carmer, 8 Hump., 624; Polk v. Farris, 9 Yerger, 209; Prescott v. Prescott's Heirs, 10 B. Mon.; Stephenson v. Hagan, 15 B. Mon.; 15 Ohio, 287; Carr v. Porter, 1 McCord Ch., 60; Hawkins v. Lee, 22 Texas; O'Brien v. Hilburn, Id., 617.

Hunt & Holland, Chesley & Johnson, Foard & Thompson and *Hancock & West*, for defendants in error, contended: 1. That the words used in the will under consideration do not come literally within the rule in Shelley's case, and that they must be therefore construed, not with regard to the rigid and unyielding conditions of that rule, but so as to give effect to the manifest intention of the testatrix.

2. That the manifest intention was to give Mrs. Stuteville an estate for the term of her natural life, with a vested remainder to the children of Mrs. Stuteville.

3. That she could convey to Reuben Bond no greater estate than she herself possessed, and hence appellants purchased an estate whose duration was measured by the term of the natural life of Mrs. Stuteville.

4. That on her death the fee vested absolutely, discharged of any particular estate, in the children of Mrs. Stuteville.

WALKER, J.—The leading principle involved in these cases was before the court for decision at a former term, in No. 356.

The opinion of the court, possibly from its own want of clearness, seems to have been misunderstood in construing the will of Elizabeth J. Bond. The court meant unequivocally to say that a life-estate was given to Mary A. Stuteville, with a vested remainder to her heirs.

No. 750 was adjudicated in the District Court before our opinion in No. 356 was published. The district judge interpreted the will in No. 750 to create a life-estate in Mrs. Stuteville, with remainder to the heirs of Mrs. Bond, the testatrix.

The heirs of Mrs. Bond are not mentioned in the will. The words "her heirs" plainly refer to the heirs of Mrs. Stuteville.

Had the District Court regarded this as a case coming within the rule of Shelley's case, that court would have interpreted the will as conveying an estate in fee to Mrs. Stuteville. In our view of the will of Mrs. Bond, the testatrix intended that her sister's children, or heirs (for it appears that Mrs. Bond had no children), were in some way to become the recipients of her bounty; otherwise why are they mentioned in her will? Why not give, in express terms, the estate she intended to her sister, without using the word heirs at all; for this word in a will is not necessary to pass an estate in perpetuity?

But it is clear to our minds that Mrs. Bond intended her devise to her sister should create a life-estate in her; else why the words "during her natural life?" Can it be for one moment supposed that it was intended by the will that Mrs. Stuteville should take a fee or remainder and her heirs a life-estate *per autre vie?* Such a construction would give an estate to the heir as the heir during the life of the ancestor, and would confer upon the ancestor the estate at her own death—all of which is simply absurd; *nemo est hæres viventis*, nor can an estate thus be cast upon one not *in esse.*

In our former opinion, as now, we adopt a primary and necessary canon of construction. The object, design or purpose of the testator, to be ascertained by reason and consistency. (See Rule 13, p. 226, 2 Redfield on Wills.) Possibly we might not have violated common sense to say

that the will of Mrs. Bond made her sister and her sister's children tenants in common for life in the estate devised.

In 1 B. & Ald., 137, Doe *et als.* v. Allcock, the testator devised all his hereditaments to his sister, A. T., and her two daughters, and their heirs and assigns equally, to be divided between them in common for and during the life of A. T., and after her death he divised the third part so devised to his sister for life, to her two daughters in fee. It was held to give the two daughters a fee simple in two-thirds, and the remainder in fee to the other third on the death of the mother. Lord Ellenborough, commenting on this will, said the testator had thrown together a heap of words, the sense and meaning of which he did not clearly apprehend; "but although the language of the will is confused and the words scattered in such a way as, if taken in the order in which they stand, they do not convey any meaning, yet in favor of common sense we may take the liberty of transposing them, according to that order which one may fairly suppose the testator would wish to have adopted, and by which one can best effectuate his intentions."

If this able and upright judge felt himself, in such a case, driven to the lights of common sense, by which to interpret the will in question, we too may be excused for taking what we deem a common sense view of the language of the will under consideration; the more especially as we believe, aided by authorities and the reasonings of wise judges, we have been enabled to place the law and common sense hand in hand throughout our former opinion. If, in commenting on the rule in Shelley's case and in the authorities referred to, we were not clear in our former opinion, we are not more unfortunate than many greater men have been before us. Chief Justice Parke says: "The rule in Shelley's case by which an estate of freehold is limited to a person, and the same instrument

contains a limitation, either mediate or immediate, to his heirs or to the heirs of his body, the word 'heirs' is construed as a word of limitation, will occur to the reader as a familiar instance of an arbitrary and technical rule of construction, the authority of which is acknowledged by the courts, even where its application may tend to defeat the intention of testator." (See Brown's Legal Maxims, 6 Am. Ed., 412.) But here we find, by note five in the margin, that the rule does not apply to any will made or republished since the Statute 1 Victoria, c26, came into operation. Section 27 provides that real and personal property, over which the testator has a power of appointment, shall pass by a general devise or bequest, unless the contrary appear.

Similar statutes have been enacted in most of our States, and we believe it would be a very unpopular doctrine to say that the rule in Shelley's case should be made to override the manifest intention of the testator. Our own court, in Hancock v. Butler, 21 Texas, 804, and Hawkins v. Lee, 22 Texas, 544, have denied the application of the rule in Shelley's case upon a statement of facts very similar to those before us. While it is admitted in those cases that a state of facts may exist to which the rule in Shelley's case would be applied, yet we do not believe that this court has ever been so organized that it would have given the rule in Shelley's case a preference to any other rule of sound legal construction. The rule has had its friends and its enemies, among the former the learned and venerable Chief Justice Gibson and Chancellor Kent; but equally learned and able jurists have denounced the rule as invented to accommodate aristocratic prejudices and interests based upon artificial reasoning and unsound logic. But I apprehend that when a case shall come before this court which invokes the application of the rule in Shelley's

case, we shall not hesitate to be guided by authority; but it may well be doubted whether, following, as we do, the common law of England as a rule of decision, we are even now bound to recognize the rule in Shelley's case as applied to wills.

We now propose to construe the word heirs in the will of Mrs. Bond as a word of purchase—as the words lawful issue were construed by the court in Hancock v. Butler—believing that any presumption to support the rule in Shelley's case is overborne by the manifest intention of the testatrix in the case before us. Thus we say, if such a construction would defeat the plain intention of the testatrix, we would not hold that a devise to A. B. and his heirs, to be used by A. B. for life, would vest the fee in A. B. under the rule in Shelley's case.

We believe with Redfield, in his treatise on the Law of Wills, Vol. 2, pp. 66, 68, that the American courts have never followed in strictness the English courts in their apparent partiality to the rule making the heir take by descent rather than by purchase; and the popular doctrine in this country as to the rule in Shelley's case is, that when it is used to define the character of the estate which it is intended to vest in the first taker, then the word "heirs" shall be construed as a word of limitation; but when it is used to designate certain persons who are to become the beneficiaries of the deed or will, such persons take as purchasers, and so strong has been the popular antipathy to this rule that where the courts have carried it beyond the boundary thus laid down the Legislatures have repealed it.

We have no question in our minds but that the word "heirs," as used by Mrs. Bond in her will, is used as a *descriptio personarum*, and she intended to apply it to the children of her sister, Mrs. Stuteville.

Having said thus much, we hope our former opinion

will be understood, and the question will be regarded as *res judicata.*

If we have added nothing, we are not conscious of detracting anything from, the "accumulated treasures of learning."

Before leaving this branch of the case it may not be improper for us to say that the newspaper versions of the opinions of this court, though generally correct, are not always so; nor do we consider ourselves forestalled from correcting errors in our opinions by what newspapers say of us. Whether we stand well or ill with the periodical press, we believe we have heretofore tried and shall in future try to discharge our duties impartially, and with our best intelligence, without regard to favor or criticism.

In our examination of case No. 356 we omitted to notice that Mrs. Stuteville had conveyed the property in question to Reuben Bond, and of course had given no opinion as to the estate she had conveyed. Our attention was subsequently, at the same term of the court and but a few days after the delivery of the opinion, called to the omission. A motion in writing was made by one of the counsel in the case, and the correction was made promptly from the bench. The appellant's counsel were not present in court, nor did the rules of this court then require notice to adverse counsel.

Another question of importance, that of improvements, is raised upon these records.

Ordinarily the tenant of a particular estate cannot charge the remainder-man with improvements; and the authorities cited by appellees in their brief apply to the cases where the tenant for life knows definitely the nature and duration of his estate; but in this case the facts are different.

Those who hold through the deed from Mrs. Stuteville

to Reuben Bond did not understand the nature of their tenure; but, in all probabilty, believed themselves to be the owners of the fee-simple. Their improvements, then, could not otherwise than have been made in good faith, and they are entitled in equity to be paid for their improvements, and are subject to be charged the reasonable value of rents and profits.

In No. 775 it is claimed that there was a compromise; but this plea of compromise was dismissed on exception, and is not even attempted to be set up in No. 750. As the plea was wholly insufficient in law, we deem it unnecessary to be further noticed.

In No. 750 the judgment of the District Court is reversed and remanded, to be proceeded with in accordance with this opinion.

In No. 775 the judgment of the District Court is affirmed.

AFFIRMED.

JOHN F. COCK, ADM'R, v. CARSON & LEWIS.

1. It seems that the surviving member of a firm owning a steam mill has authority to make all necessary repairs, under order of the probate court, and to charge the property with the expense.
2. An administrator will not be allowed to pursue such a course in the management of the trust in his hands as will result in gross injustice to other parties.
3. An administrator *de bonis non* will not be permitted to repudiate the contract of his predecessor in the trust, without compensating the party injured for all loss induced by the contract.

APPEAL from Hood. Tried below before the Hon. Charles Soward.

The facts appear in the opinion of the court.

A. J. Hood, for appellant.—An administrator can make no new contract. (25 Texas, 770, Price v. McIver.)

After Phelps had paid the partnership debts, he could not insist on their being admitted as claims against the estate. (6 Texas, 97, Holloman v. Rogers.)

The joint property should be applied to the joint debts, and the survivor account to the heirs of the deceased partner. (Story on Part., § 347; Parsons on Part., § 446.)

A surviving partner cannot sustain an action at law against the administrator of a deceased partner, on an unsettled account growing out of the partnership transactions. (White v. Waide, Walker's Reports, 263; Springer v. Cabell, 10 Miss. R., 640; Riarl v. Wilhelm, 3 Gill. R., 356; Chase v. Garvin, 1 App. R., 211; Burley v. Harris, 8 N. Hamp. R., 233; Stalhert v. Knox, 5 Miss. R., 112; Deavenport v. Gear, 2 Scam. R., 495.)

Death absolutely dissolves a partnership, and all persons are bound to take notice of the fact of dissolution. (Story on Part., § 343.)

No one can bind the estate of a dead man by entering into new contracts, nor by renewing or varying in any manner an old one. (White v. Tudor, 24 Texas, 639; Haddock, Reed & Co. v. Crocheron, 32 Texas, 276; Story on Part., § 343; Edwards on Bills and Prom. Notes, 112; Speake v. White, 14 Texas, 364; Draper v. Bissel, 3 McLean R., 275; Foltz v. Paurie, 2 Desaus R., 40; Wilde v. Jenkins, 4 Paige C. R., 481.)

Terrell & Walker, for appellees.

WALKER, J.—This is an appeal from an interlocutory judgment of the District Court, and must, under our rulings, be dismissed; but at the special request of counsel for both parties, that this court would intimate its opinion upon the law and facts of the case, in order to facilitate the settlement of the estate of J. A. Prince, deceased, and prevent unnecessary litigation, we have concluded to comply with the request.

It appears from the pleadings in the case that John H. Phelps and J. H. Prince, about the year 1860, erected and constructed the mills known as the Parker County Mills. The property was expensive, and the partners contracted debts to a considerable amount.

In 1864 Prince, one of the partners, died. His widow, H. C. Prince, and H. C. Jewel, were appointed administrators of his estate. The mills were run and the business carried on, for the mutual benefit of the partners, until on the twenty-fifth of September, 1865. Expensive repairs becoming necessary to the continued operation of the mills, by an order of the probate court of Parker county the mills were placed under the exclusive control of Phelps, the surviving partner, with authority to make the necessary repairs.

Phelps, in pursuance of this authority, purchased two steam boilers, and such other necessary machinery and apparatus as were required. Mrs. Prince, in the meantime, intermarried with one Carson, and she and her husband appear to have acted jointly as the administrators of the former husband's estate.

On the fourteenth of March, 1867, Carson and wife, acting as the administrators of Prince's estate, and Phelps acting in his own behalf, sold the mills and certain lands, by parol, to the appellees for the sum of $16,000 gold, with a collateral agreement, that the appellees were to pay off and take up the outstanding debts against the old firm of Phelps & Prince, and also the later contracted debts made by Phelps in pursuance of his authority from the probate court to make all necessary repairs. This agreement has been carried out in good faith on the part of Phelps and the appellees. They have paid the debts, amounting to about the full sum of the purchase money, and been in possession of the property since the fourteenth of March, 1867. But the appellant, who is now

the administrator *de bonis non* of the estate of Prince, refuses to allow these claims as valid claims against the estate, or to carry out the contract of the former administrators. This is an annomalous state of facts, making a case for which we can find no precedent, but it certainly comes within the rules of equity.

The appellant must do one of two things: he must either carry out the contract of the former administrators, or he must reimburse the appellees for the money they have, in good faith, paid out for the benefit of the estate. The facts may indicate that the former should be the decree of the court, having in view the equities of the parties.

An administrator, no more than an individual acting for himself, will be allowed to pursue such a course in the management of the trust in his hands as to do gross injustice to other parties. Our laws regulating the settlement of the estates of deceased persons will allow no such thing, much less do they require it.

We think this is all which need be said in this case. It is but a *dictum* of the court, but if it serve to guide the parties in a straight path it is all that is necessary.

DISMISSED.

OGDEN, J., dissenting.

J. P. LYENDECKER ET AL. V. WM. MARTIN.

1. If a defendant die before service of citation upon him, it is necessary that his administrator be served with citation and copy of the petition. It is error to render judgment upon service of *scire facias* only, in such case.
2. To render a sheriff responsible for not making money on an execution it is necessary to prove that the execution had been placed in his hands, and that while in his hands he had been required to make a levy when it was in his power to do so, and that he had failed to make such levy.

Opinion of the Court.

APPEAL from Colorado. Tried below before the Hon. L. Lindsay.

This was an action brought by appellee, Wm. Martin, against J. P. Lyendecker, a former sheriff of Colorado county, and the sureties on his official bond, Johan Lyendecker and Wm. Frels. It was sought to recover the amount of a judgment, upon which execution had been issued, against one G. W. Taylor, placed in the hands of said sheriff and his deputy, and on which the money was not collected through the fault of the said sheriff in not levying upon property.

The citations had not been served upon the sureties when both died. The administrator of Lyendecker accepted service. A writ of *scire facias* was issued and served upon G. Fehrankamp, administrator of Wm. Frels, deceased.

The administrator of Frels excepted *in limine* to the service upon him as insufficient.

The defenses on the merits were, that he had used due diligence to collect the money, and that Taylor, at the issuance of the writ of execution against him and subsequently thereto, was, and continued, notoriously insolvent.

The exceptions to the service upon the administrator of Frels were overruled, and a verdict and judgment were rendered for the plaintiff and against the sheriff and his sureties.

Appeal by the defendants.

The facts sufficiently appear in the opinion.

G. W. McCormick, for appellants.

Wells Thompson, for appellee.

OGDEN, J.—The judgment in this case must be reversed for the want of proper service upon the administrator of

William Frels, deceased. It appears that this suit was instituted in the lifetime of Frels, but that no service was had upon him, and after his death a writ of *scire facias* was served upon the administrator, but no copy of the original or amended petition, nor any proper notice of the cause of action.

The administrator appeared *in limine* and excepted to the service. We think his exceptions should have been sustained. Had service been perfected upon Frels during his lifetime, then *scire facias* upon his administrator would have been all the law requires, but without service upon Frels, the administrator was entitled to full service under the provisions of the law. This appears to have been the view of the law entertained by counsel for appellee, since in his petition for a *scire facias* to the administrator he prays for service of the original and amended petitions.

Under the facts of this case the administrator was entitled to as full notice of the action and cause of action as his intestate would have been if living, and not having received such notice, he was not bound to defend the same. The case of Boone v. Roberts, 1 Texas, 151, is not applicable to the facts of this case, as service was performed on Boon during his lifetime.

In the case of Walton v. Compton *et al.*, 28 Texas, 573, it is said that in order to make a sheriff and his sureties liable on his official bond for failing to make the money on an execution in his hands, it is necessary for the plaintiff to establish by proof that the execution in his favor was received by the sheriff in time to make the money, and that while in his hands he was required to make a levy by virtue of it, at a time when it was in his power to do so, and further, that he failed to make such levy.

In this case there is no proof of a demand upon the sheriff or his deputy to make a levy at any time. On the

contrary, the sheriff proves that he often requested the plaintiff in the execution to point out property for him to levy upon. It would appear from the testimony of the deputy sheriff that there was some property of the defendants in the execution which might have been levied upon but for the interference of the sheriff; and if the money, or a portion thereof, was not made, when there was property accessible upon which it was the duty of the sheriff to have made a levy, then he and his securities are responsible for the whole debt. (Paschal's Digest, Art. 3796.)

The court correctly refused to give the charge asked by the defendant below. The question of the statutory exemption was not properly before the court, and the jury should not have been misled by irrelevant issues.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

WALSH & GILBERT v. CHARLES MOSER.

It is error to refuse new trial where judgment has gone against defendants as partners, on notes for borrowed money executed by them individually, where it does not appear conclusively that the money was applied to the business of the partnership.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

This suit was brought June 5, 1871, by the appellee against the appellants, on two promissory notes; one signed by N. Walsh, November 19, 1867, for five hundred dollars; and the other for three hundred dollars, executed December 24, 1867, by T. D. Gilbert. Plaintiff alleged the notes were given for borrowed money, to be

used in the partnership business of Walsh & Gilbert. Verdict and judgment for plaintiffs, and defendants appealed.

Mills & Tevis, for appellants, cited the following authorities: 3 Kent, 41; Poindexter v. Waddy, 6 Mun. Va., 418; Pearce v. Wilkins, 2 Comst. R., 469; 6 Vesey, 602; Collyer on Partnership, § 473.

R. G. Street, for appellee.

WALKER, J.—This is an action brought on two promissory notes; one of the notes is signed by Gilbert, the other by Walsh. Moser sued the firm of Walsh & Gilbert. The notes are not given by the firm, nor is there any evidence to prove that the money loaned by Moser went into the firm.

The evidence in this case, so far as it was material to make out the plaintiff's case, does not support the verdict. Appellee's counsel virtually admits that the weight of evidence is against him. This is so apparent that the court below should have granted a new trial; and for the error in refusing a new trial, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

BRIDGET GALLAGHER v. P. W. BENNETT'S HEIRS.

Though a tenant will not, in general, be permitted to question the title of the landlord under whom he went into possession, yet if there be fraud on the part of the landlord in the execution of the lease, and he is unable by reason of insolvency to indemnify the tenant for rents wrongfully exacted, the tenant may, while in possession, purchase a superior title, if he does so in good faith, from a well grounded fear of eviction, and may rely on the title thus acquired in resisting a suit by the landlord for possession.

APPEAL from Harris. Tried below before the Hon. James Masterson.

Stewart & Barziza, for appellant, cited Sloan v. Martin, 33 Texas, 418, 419; Calmley v. Stanfield, 10 Texas, 551, 552; Glein v. Rice, 6 Watts, 44; Croxall v. Shererd, 3 Wall., 287.

Gray & Botts, for appellees, after reviewing authorities referred to by appellant's counsel, cited the following, viz.: Smith on Landlord and Tenant, Am. Ed., 293 and note *a;* also, p. 294, *et seq.;* Rawle on Covenants for Title, 262, 263, and 268, 269, note 3; 2 Smith's Leading Cases, 3 Am. Ed., note to Doe v. Oliver, and Duchess of Kington's case, Mary, 418–424; Smith's English Notes, 509, 510; American Notes of Hare & Wallace, 531, and 540–543.

WALKER, J.—P. W. Bennett brought this suit against the appellant to recover rent and the possession of a lot in the city of Houston.

On the sixth of August, 1861, Bennett executed a lease, for a term of twelve years, to the husband of appellant, with rent reserved. Mrs. Gallagher and her husband paid the rents to Bennett, acknowledging their possession under him, until 1867, when she refused to allow the rents to Bennett. Suit was not brought until the eighth of March, 1869.

John Gallagher, the husband, having died, the appellant, in an amended answer, sets up that though her husband leased the lot from Bennett, that Bennett never had any title, nor was ever entitled to possession of the lot, and that she did not claim under Bennett; that Bennett's only claim of title was through a tax sale, illegally made, and which conferred no title on him; that the property had been sold as belonging to Jno. Birdsall; that in truth

it did not belong to him; that Birdsall was dead at the time of the assessment and sale for taxes.

She charges that her husband and herself were ignorant of the facts at the time they leased the lot from Bennett; that Bennett falsely and fraudulently represented to them that he had a good and legal title to the premises, and that they were deceived and defrauded by Bennett's false representations; and that she remained in ignorance of the fact that Bennett was not the true and legal owner of the property until the year 1866, when John Kennedy demanded possession of the premises, and threatened her with a suit and eviction therefrom if she did not allow the rent to him; that she employed counsel to investigate the title; that her counsel informed her that Bennett's title was not good, but that Kennedy held a good and valid title. She avers that P. W. Bennett was at the time insolvent and unable to indemnify her in any manner if she continued to pay the rents to him; that Bennett's estate is insolvent; that under these circumstances she purchased the title to the property from Kennedy.

There is some evidence going to show that Bennett was served with a written notice of the defect in his title and demand made upon him to make it good; but the witness by whom the notice was sent, if at all, being dead at the time of the trial, the notice was not proven.

In an amended answer, filed April 1, 1872, the appellant sets out her title from the government down through *bona fide* purchasers. The verbal evidence introduced by Mrs. Gallagher on the trial, we think, was sufficient to have given her the right to dispute the title of her former landlord, Bennett.

There is not one word of evidence to prove that the appellant has ever acted in fraud of the rights of Bennett; she was herself made to pay to Kennedy an advance of $200 above the price he paid for the lot.

The following bill of exceptions is found in the record:

"Be it remembered, that on this, the first day of April, 1872, before our honorable District Court, on the trial of the foregoing cause, after plaintiffs had closed their evidence, and defendant had given evidence, as appears in statement of facts, the defendant offered to introduce a copy of a deed from the record of deeds in Harris county (duly proved and registered, after due notice of filing of said deed had been given to plaintiffs [through] their counsel, and after defendant had made her affidavit that she could not procure the original), from A. Briscoe, executor of the estate of John Birdsall, deceased, to John Shea, bearing date the seventeenth day of April, 1843, to the lot in controversy, and offered to continue her deraignment of title from the government down to herself, adversely to that of plaintiffs; whereupon plaintiff objected to the admission of such deed, and to any further evidence of title on the part of defendant, because there had been no testimony introduced showing that defendant had been evicted from the possession of the lot, or had been threatened with eviction by any *bona fide* owner of said lot; and that, in the absence of such testimony, the defendant could not controvert or dispute the title of plaintiff, under which she had acquired possession of said lot; and that the title to the premises could not be inquired into in this suit; which objection was sustained by the court; to which ruling of the court the defendant excepts," etc.

It will be seen by this bill of exceptions that the court ruled out the evidence of the defendant's title from Kennedy. The charge of the court instructed the jury that a tenant is not allowed to question the title of the landlord under whom the tenant went into possession, unless threat of eviction, or actual eviction by virtue of a paramount title, be shown by the tenant; but it does seem to us that

the court has rendered it impossible, by ruling out the defendant's title, to show that eviction had been threatened by one holding a paramount title.

The court further instructed the jury, under the evidence before them, to find for the plaintiff possession and rent.

The jury should have been allowed to determine whether the threat of eviction came from a *bona fide* owner of the lot. It does appear to us, that under our system of laws, this was a case to which the principle recognized in the charge, that a tenant in possession will not be allowed to dispute his landlord's title, does not apply. If there was fraud in the execution of the lease, and the estate of Bennett was insolvent and could not indemnify the appellant for rents wrongfully exacted—if she acted in good faith, and from a well grounded fear of eviction from her term under Bennett, and acting under the advice of counsel, without fraud against her landlord, she should have been allowed in this suit to test her title through Kennedy with that of Bennett to the lot.

We think the doctrine laid down in Perry v. Rice, 10 Texas, 382; Calmley v. Stanfield, 10 Texas, 551; Andrews v. Richardson, 21 Texas, 297; 2 Smith's Leading Cases, 458; 1 Wms. & Saund., 418; 6 Wend., 666; Glein v. Rice, 6 Watts, 44; and Croxall v. Shererd, 3 Wallace, 287, sufficiently supports our view of this case.

We will introduce from the opinion of the court in Calmley v. Stanfield the following quotation: "The proposition, that a tenant will not be heard to dispute the title under which he entered as a general one, is correct; but it is believed to be subject to some exceptions, and the modern tendency of the courts has been liberally to allow those exceptions; and each one, of course, must depend upon its own peculiar circumstances."

For the reasons herein indicated the judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

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38 296
37 645

E. B. NIXON AND HER HUSBAND V. W. W. ARMSTRONG.

1. A will, where the attesting witnesses are all interested, is not therefore void. The probate of the will by a witness, who releases the legacy, is valid as to all of the will save as to the legacies to the subscribing witnesses.
2. The will so proven is void as to the legacies to the subscribing witnesses.
3. By credible witness is meant a competent witness.

APPEAL from Walker. Tried below before the Hon. J. R. Burnett.

On the sixth of April, 1867, Col. Thomas Carothers executed his will, which was attested by E. B. Nixon, Primus Johnson and L. D. Cox. To each one of these witnesses the testator made bequests, referring to E. B. Nixon as "my niece, Emma Brisco, now Mrs. Nixon;" to Primus Johnson as "Primus," and to L. D. Cox as "Lidy Smith." These were all the legatees, except W. H. Smith, to whom a bequest was made. He was not a witness to the will.

On the seventeenth of April, 1867, Carothers died, having made no other will. On the twenty-sixth day of June, 1867, the subscribing witness, Primus Johnson, executed a renunciation of his legacy and relinquishment of all interest in the estate. On the next day, in the probate court of Walker county, the will was admitted to probate on the testimony of Primus Johnson, and F. D. Thornton appointed administrator, with the will annexed. Subsequently he was removed and the appellants appointed in his place, who were administering the estate

when this suit was brought by W. W. Armstrong on the fifth of June, 1871, under Article 1262, Paschal's Digest, to contest the validity of the will, and set aside the same and the probate thereof, on the grounds that the will was not lawfully attested. On the trial it was admitted that the plaintiff was a nephew of Carothers, and that Carothers died without leaving wife or children. The plaintiff demurred to the sufficiency of the answer, and moved the court, on the admission of defendants, to grant him judgment as prayed for. The demurrer was sustained by the court, and judgment rendered in favor of plaintiff, declaring the will invalid, because not legally attested, annulling the probate thereof, removing Nixon and wife from the administration, and appointing the plaintiff administrator of the estate. To the rulings and judgment of the court the defendants excepted, and gave notice of appeal.

Abercrombie & Banton and *Hancock & West*, for appellants.

No brief for appellee has reached the hands of the Reporters.

OGDEN, J.—We think that much of the learned discussion of England and America upon the subject of the necessary qualifications of attesting witnesses to a will, is rendered comparatively nugatory by the operation of our statute; and while we may look to other States and countries whose laws and institutions are similar to ours for rules of legal interpretation in doubtful cases, yet, when our statute speaks in plain and unambiguous language, that must be not only our rule of action, but of construction also.

Our statute (Paschal's Digest, Art. 536) provides that when a will is not wholly written by the testator, it shall

be attested by two or more credible witnesses. The statute, however, fails to specify who shall be considered credible witnesses in all cases, or to define all the necessary qualifications to constitute a credible witness; and therefore, whenever it becomes necessary to determine that question, the courts must be governed by the enunciations of acknowledged authorities and the dictates of reason; and it is believed that by following these guides we would come to the same conclusion as did Lord Camden, in Hindson v. Kersey, that a credible witness is a competent witness, and none other. Upon the theory that a pecuniary interest disqualifies a witness, it is almost universally held that a devisee or legatee is incompetent as a witness to attest or prove up the will under which he receives a benefit.

The controversy which has been long carried on as to the time when the attesting witness must be credible or competent, whether at the time when he attested the will, or when he was called upon to prove it, does not properly arise under our law in the case at bar, and we are therefore happily relieved from an attempt at the solution of that much mooted problem.

The will of Col. Thomas Carothers was written by one of the legatees and attesting witnesses, and attested by E. B. Nixon, L. D. Cox and Primus Johnson, all of whom were legatees under the will, and were incompetent attesting witnesses at the time of attestation; and as the statute referred to requires this will to be attested by two or more credible witnesses, the attestation was in violation, or rather in disregard, of the statute, and the will itself, under the decisions of most of the States, would be declared void if adjudged at the time of attesting. But after the death of the testator, and before the will was offered for probate, Primus Johnson, one of the witnesses, relinquished his bequest, and then came forward and proved the will.

It is now claimed, upon the authority of Lord Mansfield and others, that the witnesses are not required to be competent or credible at the time of attestation, but that if they became so at the time they present themselves to prove the will, that is all the law requires. But it would seem that even this construction of the law would not benefit the appellants in this case, for the statute requires that the will shall be attested by two or more credible witnesses, and, as but one of the witnesses have as yet become competent by a relinquishment, it follows that at the time the will was probated it was not attested as required by statute. E. B. Nixon and L. D. Cox are still claiming to be legatees under the will, and are not, therefore, competent attesting witnesses, and the will was proven when there was but one competent witness attesting its execution; and under this state of facts it is believed that even Lord Mansfield would have declared the will void. And under our law the will cannot be sustained in any particular, unless it be by virtue of the force and effect of Article 5370, Paschal's Digest, which is as follows: "If any person shall subscribe his name as a witness to a will wherein any bequest is given to him, if the will cannot be otherwise proven, the bequest shall be void, and such witness shall be allowed and compelled to appear and give testimony on the residue of the will, in like manner as if no such bequest had been made."

This statute was evidently passed for the purpose of preventing wills from failing when one of the subscribing witnesses had received a bequest under its provisions, but we can hardly imagine that the Legislature supposed that such a state of facts would be likely to arise in Texas, where three persons, strangers in law to the testator, and the principal legatees of a considerable estate, would be the only attesting witnesses of the proper execution of a will which one of their number had written. Had John-

son been the only attesting witness who received a bequest the will would have been good, as there would still have been two competent witnesses attesting the same, and, under the statute, Johnson might have retained his bequest. But in case the two disinterested witnesses had died or left the country, so that the will could not have been proven up, then, under the statute, the bequest to Johnson would have become void, and he might have proven the will. But we do not think the case before us one intended to be reached by the statute under consideration.

Again, there never has been but one credible or competent attesting witness to the will, and in order to sustain the will under the statute, at least one other attesting witness would have had to relinquished his bequest, and we can discover no rule of law or equity which could have distinguished between the three witnesses, had not Johnson made a voluntary relinquishment and selected one for sacrifice, while the other two were left to enjoy the bounty conferred, and to which bounty they were their own witnesses. We think the only proper and reasonable construction of Article 5370 is that all bequests made to attesting witnesses shall be absolutely void, unless there are the required number of witnesses attesting and to prove the will, who have received no bequests.

Again, the statute says that if the will cannot be otherwise proven, the bequests to the attesting witnesses shall be void; and if void, then its nullity must relate back to the time when the pretended bequest was made, and not to the relinquishment by Johnson. If that be so, then every bequest to attesting witnesses became null on their signing the will; for without that effect the will could not have been proven, as it had no competent attesting witnesses.

And again, any other construction of Article 5370 would render wholly nugatory Article 5361, which de-

clares that all wills not written by the testator shall be signed by two or more credible witnesses. We think it will hardly be contended that the will of Col. Thomas Carothers was ever signed by any competent attesting witnesses, who were competent when they subscribed their names, unless the statute rendered their bequests void at that time; as otherwise the will might have been attested by one real and two fictitious names, provided that there was one real person as a competent witness to prove the will.

Nor can the operation of the recent statute authorizing parties to testify in their own behalf, be invoked to aid the cause of appellants, as that statute was never intended to authorize parties to witness instruments executed to themselves; while the second section of that act prohibits either party to this suit from testifying as to any transaction with, or statements by, the testator.

Under this view of the law, we must decide that, under Art. 5370 of the statute, the will of Thomas Carothers is not absolutely and wholly void, for the want of the requisite number of competent or credible witnesses, but that the bequests to all the attesting witnesses are void; and further, that the will was properly probated as to all of its other provisions and bequests, excepting such as relate to the benefit of any and all of the attesting witnesses.

The judgment of the District Court is reversed and the cause remanded for proper proceedings in the court below.

REVERSED AND REMANDED.

HARMON WARD AND S. P. HAMILTON v. THE STATE OF TEXAS.

A bail bond is fatally defective which does not require the defendant to appear at any particular place or county, to answer the charge against him; and it is error to render judgment final by default upon *scire facias* based on such bond.

ERROR from Freestone. Tried below before the Hon. John B. Rector.

This case was brought to the Supreme Court by writ of error, from a final judgment by default, on the following bail bond:

"THE STATE OF TEXAS, } Know all men by these pres-
County of Freestone. } ents, that we, J. W. Orchard, as principal, and Harmon Ward and S. P. Hamilton, as sureties, bind ourselves unto the State of Texas, in the sum of two hundred dollars, conditioned that the said John W. Orchard will appear in person at the next regular term of the District Court, August term, 1871, then and there to answer the State of Texas, of theft of beef steer, filed at the April term of the District Court, 1871.

"Witness our hands and scrolls for seals, this —— day of ——, 1871.

"JOHN W. ORCHARD, [Seal]
"HARMON WARD, [Seal]
"S. P. HAMILTON, [Seal]

"Bond taken and approved, this second day of August, 1871.

"J. B. ROGERS, Sheriff,
"By T. J. Tatum, Deputy."

No brief for plaintiff in error has been furnished the Reporters.

Attorney-General, for the State.

Statement of the case.

OGDEN, J.—The Attorney-General confesses many errors in the record and judgment of this case, but one of which do we deem it necessary to notice.

Judgment final was entered upon a forfeited bail bond, but the bond is fatally defective in not requiring the defendant to make his appearance at any particular place or county to answer the charge against him. In this respect the bond fails to comply with the requirements of the statute, and is insufficient to support any judgment whatever.

The judgment is therefore reversed and the cause dismissed.

REVERSED AND DISMISSED.

P. J. & R. S. WILLIS v. CYNTHIA JOHNSON ET AL.

1. The consideration, which must be alleged and proven, to support the plea of innocent purchaser, must be valuable and legal.
2. The defense of innocent purchaser for valuable consideration cannot be sustained when the consideration paid was Confederate notes or bills.

APPEAL from Montgomery. Tried below before the Hon. James Masterson.

The appellees brought suit on a promissory note executed by John R. Cook to Bede Johnson, for $4300, alleging ownership, and that the note was in part consideration for certain lands, described in the petition; that the lands were by Cook sold to appellants, and that they had notice of the lien upon the land.

The defendant pleaded general denial, and *bona fide* purchase, without notice.

The verdict of the jury was as follows:

"We, the jury, find for plaintiffs, against J. R. Good, the sum of five thousand eight hundred and seventy-

seven and $\frac{70}{100}$ dollars, principal and interest on the note sued on, given for purchase of the land mentioned in plaintiff's petition; and find that the defendants, P. J. Willis & Bro., bought the land without notice of the vendor's lien; but the payment by said Willis & Bro. to J. R. Cook being Confederate money, find said land liable for amount of judgment against J. R. Cook."

Judgment for plaintiff's, and foreclosing vendor's lien against appellants.

N. Hart Davis, for appellants.—Appellants did and do maintain, that they were and are entitled to a judgment and decree in their favor on the verdict of the jury.

These appellants are brought into equity by plaintiffs (appellees) to contest and defend a charge sufficient (if true) to subject the land to sale for plaintiffs' benefit, but which appellants knew, and proved to be false—that is to say, that they, appellants, bought with notice.

Parties come into courts of justice to meet matters contested, places where justice is judicially administered.

Ordinarily we would content ourselves as having performed duty by referring to the case of Hall & Jones v. Jackson, 3 Texas, 309, that proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations the court cannot judicially act upon them as a ground of its decision, and cases therein referred to.

My excuse for referring to further authorities is the manifest and purposed disregard of it by the District Court in this case, in the charge given to the jury of his own accord in the decree, and in his refusal to correct the decree, or to grant a new trial.

This canon has governed in cases, 3 Texas, 309, 318; 6 Ib., 314; 9 Ib., 77; 1 Ib., 447; 2 Ib., 208, 551; 12 Ib., 330; 19 Ib., 410, 411; 7 Ib., 345; 28 Ib., 227.

In the American Chancery Digest, Vol. 1, we find on page 495: "No decree can be founded upon evidence in relation to matters not put in issue between the parties by the pleadings." (Tripp v. Vincient, 3 Barb. Ch. Rep., 613.) Page 497: "A decree must be sustained by the allegations of the parties as well as by the proofs in the cases, and cannot be founded on a fact not put in issue by the pleadings." (Corneal v. Banks, 10 Wheat., 181.) Page 498: "A decree must be not only *secundum probata*, but also *secundum allegata*." (Pratt v. Northam, 5 Mason, 113.) Page 507: "A decree must be founded on and in conformity to both the allegations and proofs." (Gregory v. Power, 3 Litt., 339.)

I cannot suppose that this court would look into further cases or elementary works, if into any of these, on this plain and fundamental rule for the government of parties and guides for courts.

Do the appellees stand in a position to ask this court to ignore this rule, or to send this case back for them to amend again?

They persisted in their charge that appellants bought with notice, actual notice.

Plaintiffs (below) are in a court of equity seeking equitable relief against appellants, who hold a perfect and completely executed legal title, clear, fair and full, emanating from the ancestor of appellees, from and under whom they (appellees) claim a secret hidden equity against appellants' honestly legal title of record.

But we hope successfully to maintain before this court that appellants are entitled to hold the land free of any supposed lien of plaintiffs, even if the case were stripped of all the rules and safeguards of pleadings and evidence.

His honor the district judge charged the jury, in substance, that if they found from the evidence that the only

consideration paid by appellants was Confederate money, they (appellants) could not hold the land against plaintiffs. The "Confederate money" part of the charge, covering two pages, when reduced to a legal point, means that if Cook received, and willingly too, Confederate money of the appellants for the land, then the jury would find against the appellants.

That the appellants objected and excepted to the charges, rulings, opinions and judgment of the District Court on the Confederate money question in this case, will be shown by the charges asked by them, and by their motions, and also by their first, second, third and fourth bills of exceptions, and their assignment of errors.

Let us see now if there is any decision of this court that is against appellants' right to hold this land free of the vendor's lien, or that puts the "highest court of Texas" in conflict with the adjudication of the Supreme Court of the United States in the case of Thorington v. Smith, 8 Wallace.

Thorington v. Smith was a case in equity, and the court did justice. The defendant had not a full legal title to the land; a defeasance was executed at the same time with the deed, and as a "part of the same transaction," and was a "lien and mortgage on said real estate." We have found no such or like case in the Texas Reports, consequently no conflict.

There may be expressions in the decisions of this honorable court not harmonizing with all the expressions of the court in Thorington v. Smith. The case now before the court is much stronger for appellants than was Thorington v. Smith for appellant or appellee.

First and foremost, this is a complete and fully executed contract, a deed of conveyance with general warrant, and entire payment in fact and on the face of the deed, without notice, and from a vendor having a perfect title

of record from plaintiffs' ancestor, whose note they sue to collect, and said plaintiffs are in equity on a secret lien concealed by the solemn act of said ancestor, and so remained for years.

I have examined all the Texas cases that are reported on the question of "Confederate money," and must content myself by referring to them, or most of them: Anderson v. Lewis, 31 Texas, 675; McCartney v. Greenway, Id., 754; Cleburg v. Bonds, Id., 611, 605, 604, 557, 443, 252, 201, 171; 30 Texas, 753, 754, 611; 32 Id., 43, 64, 183, 333, 397, 515, 670; 33 Id., 323, 346, 351, 395, 471, 479, 511, 629, 675, 783, 157, 622; 34 Id., 220, 327, 413, 516.

These establish, first, that where the consideration of a note or executory contract was "Confederate money," it was void and would not be enforced. Second, where a debt was payable in "Confederate money," on its face or in fact, it was void, etc. Third, where a good money debt had been paid in "Confederate money," and willingly received by the creditor, it could not be re-collected. Fourth, if not willingly received it could afterwards be collected, the leading or most satisfactory or principal case being Wood v. Willis, 32 Texas. Fifth, if paid to an executor, etc., though by him willingly received, it was no discharge of the debt.

The Texas cases clearly establish that executory contracts in and for "Confederate money" will not be enforced, nor executed ones disturbed.

Appellants hold under an executed contract, full, legal and of record, from one clothed by appellees' ancestor with full power, in due and solemn form of law, to alien the land in fee, free of encumbrance.

MacKreth v. Symmons (15 Vesey, Jr.), reviews many former English cases, and lays down the doctrine that the vendor's lien holds against the vendee, volunteers and purchasers with notice, or having equitable interests only,

claiming under him. Appellants come under neither of these heads. Their payment was made at the purchase, was adequate, was satisfactory, was valuable in the business sense of the term, fully executed, "and there is no reason to suppose that the contract was entered into for the purpose of giving currency to the Confederate notes, and thus aiding the rebellion," and "there was no illegal design." We respectfully maintain, in such a case as the case now before this court, a court of equity will not take from a defendant real estate to which he has a full legal title, for the benefit of a complainant, standing as these complainants (appellees) do.

Every man ought to pay his debts if he can, and should he give away his property, it is liable; but if, during 1861–5, he sold it for Confederate money paid down, is it liable? If an indebted man, during those times, collected what was due him, but in fact received it in Confederate money willingly, are those debtors of his liable in garnishment or equity to his creditors? We know of no such or like decision, here or elsewhere.

Are fair executed contracts to be ripped up by third persons because payments were made in Confederate money? We believe they will not be, because not consistent with the rules of law, or the principles of equity, or the peace and quiet of society.

Baker & Maxey, for appellees.—The appellants made motion to enter judgment for them, notwithstanding the verdict, and for new trial, both of which being overruled, they gave notice of appeal.

It is submitted as a principle that will not be questioned, that the vendor's lien for unpaid purchase money of land attaches to the land as against the vendee, his heirs and privies in estate (2 Washb. on Real Property, 88); and in general against all not clearly appearing to be

purchasers for value, who have actually paid the purchase money (Lead. Cas. in Equity, Vol. I, p. 277; High v. Battle, 10 Yerger, 335); and against volunteers, who pay nothing for their deed, and who therefore cannot set up the want of notice (2 Washb. on Real Property, p. 89; 2 Story Eq., § 1225; Burlingame v. Robbins, 21 Barb., 327; Upshaw v. Hargrove, 6 S. & M., 286; MacKreth v. Symmons, 15 Vesey, 329); and against those that purchase without notice at the time, but acquire notice before paying the purchase money. (Ripperdon v. Cozine, 8 B. Mon., 465.)

Applying these principles to the facts of this case, it is manifest that as between the vendor of Cook and appellants, the latter were only volunteers; they paid in law nothing for their deed, and therefore took the land subject to appellees' equity, just as Cook held it. Volunteers without notice, having paid none of the consideration, occupy the same relation to equities against their vendor, as do purchasers for value with notice. Their position is more analogous to that of one who takes an estate by succession, or to an assignee of an insolvent.

Burlingame v. Robbins, 21 Barb., 327, was a suit by the vendor to enforce his equitable lien against the land in the hands of sub-vendee. The referee found as facts that at the time the sub-vendee took the conveyance he had no notice of the plaintiff's demand, but he paid no consideration for the deed; the court held that although the law protects from the lien of the vendor one who purchases in good faith for a valuable consideration, and without notice, it will not protect a mere volunteer who has not paid anything. The only material distinction between Burlingame's case and the one under consideration is, that in the former the sub-vendee paid nothing, while in the latter he paid Confederate money. Actual payment of a valuable consideration is an indispensable ele-

ment in the constitution of what courts of equity deem a purchaser for value without notice. (Frame v. Frederick, 32 Texas, 308.)

In this case the proof shows that appellants paid only Confederate money. As between them and their vendor, the contract being executed, the courts would not interfere with their title, although the consideration was illegal. But as between them and the creditors of their vendor, holding a lien on the land for unpaid purchase money, appellants have paid nothing. Confederate money being the consideration on which appellants received their deed from Cook, it was illegal, and therefore of no value; being of no value, they have paid nothing on the land as against the lien of Cook's vendor. They are volunteers as to said lien, and in relation to it hold the land precisely as Cook did. Hence, the want of notice cannot avail them—they cannot set it up. (2 Washburn, *supra.*)

It is not insisted that the burden was on appellants to show that they had purchased for value and without notice. Holding, as they did, the legal title, fair on its face, in seeking to enforce their lien against appellants, as purchasers, the burden was on appellees to show one of two things: either that appellants had notice of their lien, or that they had not paid a valuable consideration. (McAlpin v. Burnett, 23 Texas, 649.) The latter, it is submitted, was abundantly shown by the testimony of one of the appellants. (Massie & Goble v. Rice *et al.*, from Harris county, decided May 6, 1872.)

Appellees' petition alleged that appellants purchased of Cook with notice of their lien; but it is insisted by appellants that because it was not alleged that the latter paid no valuable consideration, or in fact paid Confederate money, for their deed, therefore appellees should not have been allowed to prove this fact, and having proved it, cannot avail themselves of it in their pleadings.

If it be true that a volunteer who pays nothing for his deed cannot set up the want of notice, as stated in 2 Washburn, *supra*, then it follows that proving appellants to be volunteers, places them in the same condition as if they had notice of appellees' lien.

The only reason for making such an allegation would be to give appellants notice, so that they might come to trial prepared with their proof to meet it, and thus prevent surprise. But in this case the reason of the rule ceases, because the testimony on this point came from one of appellants, when he made himself a witness to sustain his own plea; it came out upon cross-examination by appellees, without objection on the part of appellants, either to the question or the answer; it came from a party to the suit, and the identical one that made the purchase of Cook and paid the Confederate money, and so far as the proof shows was perhaps the only person that knew the fact except Cook, who was a non-resident. He therefore could not be surprised at his own answer to the cross-interrogatory of appellees, which brought out this fact in evidence; and as it was a truth which he was compelled to admit, and known only to him, appellants could in nowise have been benefitted by an allegation of the fact.

It is therefore insisted that there was no error in the charge of the court below, the finding of the jury, or the judgment of the court, for which this cause should be reversed. But if, in the judgment of this court, appellees' petition was defective in the particular alluded to, for which the cause should be reversed, then it is asked that it may be remanded, that the proper amendment may be made, and for new trial.

WALKER, J.—This suit was brought against one Cook for a balance of the purchase money, and to enforce a vendor's lien on the land in cotroversy.

Syllabus.

The appellants claimed to be innocent purchasers for a valuable consideration without notice. The jury found that they were purchasers without notice, but that the whole of the consideration paid was Confederate money. On this verdict the court entered judgment and decree for the appellees.

We have never held that Confederate money was a good or valid consideration to support a contract. We have refused to disturb executed contracts, or to enforce executory contracts; but here the appellants, in order to make out their title to the land, must show that they paid a good consideration. This they have not done. The judgment of the District Court is correct, and is affirmed.

AFFIRMED.

H. N. DUBLE v. BATTS & DEAN.

1. If property be delivered by the maker to the payee of a promissory note upon a written contract prescribing conditions by which the proceeds of said property are to be applied as a credit upon the note, such delivery at once goes to the credit of the note. The amount of credit is to be determined by the contract of delivery; and any subsequent misunderstanding as to the terms of such contract will not render the proceeds subject to garnishment at suit of another creditor.
2. Telegrams communicating an offer and accepting the same, when acted on form a contract, governing the acts of the parties under the stipulations of the telegrams.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

The facts appear in the opinion.

E. M. Pease, for appellant.

Mann & Baker, for appellee.

WALKER, J.—On the fifteenth of March, 1871, the following telegraphic correspondence took place between H. N. Duble and W. O. Smith, his agent at Marlin, to-wit:

"MARLIN, March 15, 1871.

"*To H. M. Duble:*

"Hailey has turned over thirty-five bales of cotton, and has a check for $4000, currency. I have agreed to discount his last payment fifteen per cent. Are you willing?

"W. O. SMITH."

The reply is as follows:

"MARCH 15, 1871.

"*W. O. Smith, Marlin:*

"Am willing for Hailey to discount his payments, as proposed. Will you or he be down? Answer. Ship cotton promptly. "H. N. DUBLE."

Smith replied to this telegram as follows:

"MARLIN, March 15, 1871.

"Hailey nor myself can come. Will mail check at Kosse, to-morrow. Will ship cotton as quickly as I can get teams to haul it. "W. O. SMITH."

The question involved in this case turns upon the construction of these telegrams.

On the seventeenth of April following, Batts & Dean sued the Haileys for about $2000, and garnisheed Duble. Judgment went by default against the Haileys; and an issue being made up on the question of the garnishee's liability, was submitted to a jury, and they found for the plaintiffs against the garnishee.

There was but one witness examined, Duble himself, and we do not hesitate to say that his evidence authorized the jury to find as they did, yet he may be mistaken as to the condition of things between himself and the Haileys.

It does not appear from the telegrams how far the Haileys authorized the correspondence of March 15, 1871, between Duble and his agent Smith. It does appear,

however, that they turned over the check referred to, and the thirty-five bales of cotton, which acts would authorize any court in holding Duble bound to the contract made by his agent Smith; and although he may have misunderstood what was meant by discounting at fifteen per cent., or he may have been disposed to quibble about it, yet that is a question which the law would settle, and we have no hesitation in saying that he is bound to the Haileys to credit their note, with the proceeds of the checks and cotton. Then, is he bound to respond to the plaintiffs in this action as garnishee? We think not.

The court below should have construed the contract of March 15, 1871, and instructed the jury accordingly. It certainly would be gross injustice to hold Duble bound to pay the money to the plaintiffs under their writ of garnishment, and yet leave him bound, as he certainly is, to credit the money to the Haileys on their note, in accordance with the contract. His quibbling about what was meant by discounting at fifteen per cent., after the checks and cotton had come into the hands of his agent, can make no difference in the case. Should the matter ever come before a court, it is a matter easily ascertained what is meant in commercial parlance by discount at fifteen per cent.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

C. H. McCORMICK & BRO. v. M. G. BUSH.

1. It is error to strike out an answer which, though it may be untrue in fact, presents a complete bar to the plaintiff's action.
2. Where suit was for services as agent under contract, for the years 1860 and 1861, which fixed the compensation at the same amount as in a contract

between the same parties for the year 1859, it was error to refuse to permit the contract of 1859 to go to the jury.

3. In a suit by a sub-agent it is error to exclude from the jury the contract between the principal and the agent.
4. An agent or trustee cannot delegate the authority conferred upon him without an express power to that effect; and where any rights are claimed under the exercise of that authority, the power to make such delegation must be expressly alleged and proven.
5. When money is advanced to an agent in the regular discharge of his agency, and for the especial benefit of the principal, the principal may ordinarily be held responsible; but unless it be made clearly to appear that the loan or advance was made for the especial benefit of the principal, then the agent alone is responsible, in the absence of special authority from the principal.

Appeal from Grayson. Tried below before the Hon. C. C. Binkley.

On the twenty-first of June, 1868, M. G. Bush brought his suit against C. H. McCormick & Bro., alleging that the defendants, on the first of January, 1860, through their general agent, John McKay, contracted with plaintiff to make him their agent for the counties of Grayson and Collin, Texas, for the sale of the defendants', McCormick & Bro.'s, reapers and reapers and mowers, setting forth specially the terms of the contract, and appending a list of persons to whom he had sold machines in 1860 and 1861, asserting that he had been the agent of the defendants in 1859, and was continued for 1860 and 1861 on the same terms. He alleged, further, that in 1861 he was compelled to deliver the notes taken under his agency to the Confederate States Receiver, one F. J. Patillo, under the confiscation acts of the Confederate States, and that since peace had been restored, the defendants had taken possession of the notes and employed another agent, by which acts, under the contract, his right had accrued against McCormick & Bro. for compensation, which had not been made. He further alleged that the defendants were indebted to him for a sum of

money advanced by plaintiff to John McKay, the general agent of plaintiff, for the use of plaintiff.

The defendants filed a general denial, pleaded in reconvention that the plaintiff had appropriated eighteen machines to his own use, and finally pleaded that the plaintiff had fraudulently combined with one Frank J. Patillo, who was the Confederate States Receiver, and voluntarily abandoned the service of defendants, for the purpose of cheating and defrauding the defendants out of all sums of money due them on the sales of reapers and reapers and mowers, in 1860 and 1861; that he accepted a subagency under said Patillo, and took possession of said notes from him, and collected the whole of them in Confederate money; and after retaining ten per cent. out of the collections, paid the remainder to the said Patillo as Receiver of the Confederate States, at war with the United States; by reason of all which, the plaintiff was not entitled to compensation from the defendants for his trouble in selling the said property.

The answer setting up these facts was, on motion, stricken out by the court, as constituting no defense to the action.

The trial came on to be heard in June, 1871. During the progress of the trial the defendants offered in evidence a contract for 1861, with John McKay, by them as their general agent for Texas, for the management of their business, and authorizing him to appoint sub-agents, whom he was to pay, and for whose conduct he was to be responsible, which, being objected to, the court excluded.

They also offered to show the truth of their plea of voluntary abandonment and fraudulent combination, by a witness, which evidence was also excluded.

By the plaintiff was offered in evidence a contract made by John McKay, as general agent of defendant, C. H. McCormick, purporting to make the plaintiff an agent for

the sale of machines in the counties of Grayson and Collin, for the year 1859, which was objected to, and objection sustained, and to which plaintiff excepted.

Verdict and judgment for plaintiff for $1050, and defendants appealed.

Ogden, J.—There is error in the ruling of the District Court in this case in sustaining a motion to strike out certain portions of defendant's answer. The answer charges, substantially, that the plaintiff, if he ever was the agent of defendants, "voluntarily abandoned their service and combined and confederated with one Patillo for the purpose of cheating and defrauding them, in which confederation he turned over to said Patillo a large amount of notes and other property belonging to defendants, whereby they were greatly damaged, and that he thereupon voluntarily engaged himself in the service of said Patillo as a sub-agent," etc. If this plea is true, it forms a complete bar to any claim for compensation for services. (Paley's Agency, 104; Principal and Agent, 356; and Comyn on Contract, 1 Vol., 371.) The truth of such plea must depend upon the testimony, and if the plea were in fact untrue, still it would be error in the court to strike such a defense from the pleadings. The order of the court striking out this plea is not in the transcript, yet the plaintiff below claimed that it was stricken out, and the ruling of the court on the objection raised to the evidence of Ferguson, which was offered to prove the truth of that plea, clearly shows that the court considered it had been stricken out. We think the plea a good one, and the court erred in rejecting evidence of the truth of the same.

Upon the trial the plaintiff claimed compensation for services as agent of defendants for the years 1860 and 1861, and that the contract of agency for those years was

the same as that made for the year 1859. When he had proven that there was a contract for 1860 and 1861, he had the right to prove what that contract was by a reference to the contract of 1859. We, therefore, are of the opinion that the court erred in sustaining the objection raised to the introduction, in evidence, of that contract of 1859 between McKay as general agent and the plaintiff. And here is made manifest a fatal error in the judgment of the lower court, in this, there was no evidence of the terms of the contract for 1860 and 1861 excepting by reference to the contract of 1859, and as that was ruled out, there was no evidence of the terms of the contract, and no evidence of the value of the services, and therefore no legal foundation for any judgment for services whatever.

There is another fatal error in the rulings of the court which will require a reversal of the judgment. The plaintiff claims compensation for services rendered in pursuance of a contract made between the plaintiff and one McKay, who, it is claimed, was the general agent of defendants, therefore authorized to bind his principals in contracts with sub-agents; but when McKay's contract of agency with defendants, which contained a very specific enumeration of his powers and authority as such, was offered in evidence, on objections raised it was ruled out. This certainly was such an error as will require correction. The plaintiff claimed by reason of his contract of subagency with McKay, the general agent of defendants, and yet the court ruled out proof of the authority of that "general agent."

The general rule of agency and trusts is, that an agent or trustee cannot delegate the authority conferred upon him without an express power to that effect; and where any rights are claimed under the exercise of that authority, the power of delegation must be expressly alleged

and proven. In Dunlap's Paley's Agency, p. 177, it is said: "A factor cannot delegate his employment to another so as to raise a privity between that other and his principal, or consequently to confer upon the person deputed, as against the principal, any right, whether of commission, repayment or lien." And again, on page 309, the same author says: "The party who avails himself of the acts of an agent must, in order to charge the principal, prove the authority under which the act was done. If the authority be created by a power of attorney, it must be proven by the production of the instrument itself, that it may appear whether the authority has been pursued." Chancellor Kent says (Kent's Com., 2 Vol., 633): "An agent, ordinarily, and without express authority, or a fair presumption of one growing out of a particular transaction or usage of trade, has no power to employ a sub-agent to do the business. The maxim is, that *delegatus non potest delegari*, and the agency is generally a personal trust and confidence which cannot be delegated."

We think, therefore, that the plaintiff below, as he claims under a contract with McKay, as the agent of defendants, should have alleged and proven that McKay, in 1860 and 1861, had express authority to contract with him as sub-agent, so as to bind his principal; and under defendant's general denial of plaintiff's agency, we think they should have been permitted to prove the character of McKay's authority as their general agent, and this could not be done with more certainty than by the production of his executed power or contract as such agent. The court therefore erred in sustaining the objection to the introduction of McKay's contract with the defendants. But the contract between McKay and appellants, existing in 1861, as exhibited in a bill of exceptions taken on the trial, shows affirmatively that at that time he, Mc-

Kay, had no authority whatever to bind his principal in any contract with sub-agents.

There is also an error in the charge of the court in regard to the three hundred and fifty dollars paid by appellee to McKay, which, if as an abstract proposition of law it were unobjectionable, yet which, when applied to the facts of the case, was irrelevant and may have misled the jury. The only testimony in regard to that transaction was given by the son of appellee, who testified in substance that in the fall of 1860 McKay was going to Chicago, and that the plaintiff advanced to him, for the defendants, a sum of money, which, after referring to the book, he said was three hundred and fifty dollars. In his statement there is no intimation that the money was advanced at the special instance and request of defendants, or that they knew anything about it, and indeed his whole statement would naturally lead to the conclusion that the defendants were ignorant of the transaction. Under these facts the court charged the jury that "if they believed from the evidence plaintiff advanced any money for defendants, at their request or of their authorized agent, they will find the amount so advanced, with interest," etc. There can be set up no pretense, from the evidence, that defendants had requested any such advancement; and the latter clause of the charge cited is not correct law, unless the court meant by "their authorized agent" an agent specially authorized to borrow money, since it is a general principle of the law of agency that it requires special authority to authorize an agent to borrow money on the responsibility of his principal.

In Theobald & Hammond's work on Principal and Agent, p. 337, it is said: "If an agent undertake, for his principal, to pay a sum of money, without any authority, he alone is liable on the promise, and so if without any authority he borrow money." The same doctrine

is announced in Dunlap's Paley's Agency, 386. The true doctrine is believed to be this: when money is advanced to an agent in the regular discharge of his agency, and for the special benefit of the principal, the principal may ordinarily be held responsible; but unless it be made clearly to appear that the loan or advance was made for the especial benefit of the principal, then the agent alone is responsible, in the absence of special authority from the principal.

From the evidence in this case, it is fair to suppose that the advance made to McKay was primarily for the benefit of the agent and not his principal, and until it is proven that he had special authority to borrow on their account he alone can be held liable for the advance made. There was no error in the ruling of the court in excluding the books offered by the plaintiff below. They were not sufficiently proven up to entitle them to be introduced in evidence, and indeed, from the very imperfect description of them by the witness, it is quite doubtful whether they could be proven up so as to be admissible.

For the errors herein indicated, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

OSCAR FREDERICK, AND I. N. DENNIS, EXECUTOR OF A. C. HORTON, v. M. C. HAMILTON.

F. SCHULTZE AND HORTON'S EXR. v. M. C. HAMILTON. 38 321 | 86 34

1. It is not error in the court below to direct the jury to amend their verdict as to a clerical omission or to express clearly their intention.
2. The withdrawal from the district surveyor's office, in 1839, of a located certificate and of all written evidence of the location thereof, and failing to return the same for ten years, are facts from which an abandonment of the location may be presumed.

Statement of the case.

3. Possession of land by one person is not of itself evidence of the right or claim of another in the land; and in the absence of notice to the junior locator that the occupants held under the elder claim, such possession does not affect the right of the junior claimant.
4. The prosecution of an unsuccessful suit for *mandamus* against a surveyor to compel him to make a survey upon an irregular file or location does not excuse a failure to perfect such file or location into a survey under the act of tenth of February, 1852, "concerning surveys of land."
5. It is not error to exclude a judgment relating to land offered in evidence and not recorded in the county where the land is situated.
6. A *mandamus* suit against the Commissioner of the Land Office is not notice of the claim of the plaintiff, unless the land be so described in the pleadings that it may be known what land is the subject of controversy.
7. Article 10, Section 2, of the Constitution of 1869, declaring, "That all surveys of land heretofore made, and not returned to the General Land Office in accordance with the provisions of 'An act concerning surveys of land, approved the tenth of February, 1852,' are hereby declared null and void," applies to locations and surveys made prior to the adoption of the Constitution, and presents a rule of decision for courts in passing upon such locations.
8. It is not error to reject evidence offered to sustain a title which, from such evidence offered, is a nullity.

APPEAL from Guadalupe. The Frederick case was tried below before the Hon. J. J. Thornton.

The Schultze case was tried below before the Hon. Henry Maney.

The pleadings in the two cases are identical, except that the proceedings in Horton v. Brown were not pleaded in the Frederick case.

The statement is given from the record in the Schultze case, it being more perfect.

The suits were trespass to try title, filed on the twenty-second of March, 1853, by M. C. Hamilton, appellee, against Frederick in the first case, and against Schultze in the second, tenants in possession, to recover 1280 acres of land patented to plaintiff under a certificate in the name of Henry Foster.

On the seventeenth of October, 1853, A. C. Horton, as vendor or landlord of the defendants in each case, an-

swered and first plead a general denial, and alleged that on the first day of July, 1838, the board of land commissioners of Matagorda county issued to him a certificate for a league and labor of land; that it was recommended by the traveling board of land commissioners on the nineteenth of February, 1838; that he located one league of it on league known as No. 1, on the San Antonio road, on the east side of the Guadalupe river, and on the north side of the San Antonio road; which entry or location was endorsed upon the back of said certificate, in the words and figures following, to-wit:

"Located one league of land on the San Antonio road, Guadalupe river, east side, on league one, this February 19, 1838.

(Signed) "B. SIMS,

"County Surveyor for the County of Bastrop."

That on the twenty-fourth of February, 1838, Sims, as surveyor of Bastrop county, filed in his office a document to the following effect, to-wit:

"Plat of a league of land surveyed for Albert C. Horton, situated on the west side of the Colorado river, on the east margin of the Guadalupe river and San Antonio road. Reference to the General Land Office for the field notes. I certify that the above league of land was surveyed according to law.

"Given under my hand, in the town of Bastrop, this February the 24th, 1838.

(Signed) "BARTLETT SIMS,

"C. S. Bastrop.

"Twelve and one-half labors temporal and twelve and one-half pasture land."

And further, that the field notes to which reference was made by said surveyor, was a survey before that time made and returned by Sims and Shackelford, on the twentieth of January, 1835, and are as follows, to-wit:

Statement of the case.

"Plat and field notes of one league of land surveyed for Henry Brown, under the direction of T. Chambers, commissioner, and R. M. Williamson, agent, for B. Milam, Esq., situated on the east side of the Guadalupe, beginnning at a stake on the San Antonio road, from which a pecan fourteen inches in diameter bears north 75° west 18 varas; a hackberry 6 inches in diameter bears south 31° east 7 varas; thence north 45° east with the meanders of the San Antonio road 6666 varas to a post and southeast corner of league No. 1, where set a stone; thence south 45° west 4945 varas to a post and northeast corner of league No. 1, where set a stone; thence south 45° west to post and northeast corner of league No. 1, where set a stone; thence south 45° east 2400 varas to a stone and corner on the Rio Guadalupe; thence down the river with the meanders thereof to the place of beginning.

"Seven labors temporal, eighteen pasture land.

"Chain-bearers, E. Curtis and H. Reed.

"Surveyed by Sims and Shackelford, D. L. S.

"January 20, 1835."

That he thereby became entitled to the league of land; that the survey made by the said Sims, and reference made by Sims to the field notes made by Shackelford and Sims for Henry Brown, on file in the Land Office, constituted a valid survey, and entitled him to the patent for the land.

And he alleged that he had never vacated or abandoned said location, but he had used all due diligence to obtain a patent therefor; that he had been prevented from obtaining his patent by the fraudulent conduct of the plaintiff and others in locating certificates on said land, pretending that his location was in violation of law, and pretending that the same had more than the legal front on the Guadalupe river.

And alleged that at the time he made his location, one Burleson Gage had located a league of land immediately back of the Brown survey, so that he was prevented from so locating his league certificate, and getting the quantity of land that he was entitled to, if he had been compelled to take only half front on the river; that the plaintiff went before the Commissioner of the Land Office and represented that this defendant's claim had been adjudicated by the District Court of Travis county, and by the Supreme Court, and induced the Commissioner to issue patents to the land; that by reason of his prior appropriation of the land, and the false representations of plaintiff's counsel, the said patents to plaintiff were void, and conferred no title upon plaintiff.

On the fifth of May, 1854, the plaintiff filed an amended petition and replication to the defendant's answer, and plead in bar of the defendant's defense the judgment and decree rendered in the District Court of Travis county, wherein the defendant Horton was plaintiff, and James R. Pace and plaintiff M. C. Hamilton were defendants, which judgment was affirmed by this court at the fall term, 1852.

And the plaintiff further replied, that if the defendant ever had any such location, or any right under it, that at the date of filing plaintiff's petition the same was void, because more than twelve months had elapsed from and after the passage of the act approved February 10, 1852, entitled "An act concerning surveys of land," before the commencement of plaintiff's suit, without any survey of defendant's location, or any proceeding on the part of the defendant to compel a survey thereof, except the suit of defendant against the said J. R. Pace and plaintiff; and denied that any survey had ever been made except the survey made for Rowe, under whom he claimed.

And the plaintiff denied the validity of the alleged

survey made for Brown, and alleged if it was a valid survey for Brown, he denied the legal sufficiency of any such survey for the defendant Horton, or that any patent could legally issue to defendant by virtue thereof.

To the last described replication the defendant, Horton, filed a rejoinder, alleging that he was not estopped by the judgment of Horton v. Pace and Hamilton, plead in bar by plaintiff, because the same matters were not adjudicated, nor was it between the same parties; and further alleged that he was not bound by the statute of the tenth of February, 1852, requiring surveys and field notes to be returned within twelve months, because one year had not elapsed from the date of the affirmance by this court of the judgment in the case of Horton v. Pace and Hamilton before the institution of this suit.

The defendant further answered, that on the nineteenth of February, 1838, when he made his original location, the land was vacant; and if the reference to the General Land Office for the field notes by the surveyor was not a sufficient and valid survey of the land, that the location remains in full force; that he had been prevented from obtaining a valid survey, first, because the surveyor deemed it unnecessary; second, because the land appeared titled on the books of the Land Office to Henry Brown, and that he was under the necessity of bringing suit to have Brown's title canceled; third, because the surveyor of Travis county refused to make the survey on account of the location made under which plaintiff claims the land, and that he had never been able to obtain a survey of the land under his location, and get the field notes returned to the Land Office.

On the twelfth of May, 1870, the defendant filed his plea of the statute of limitation of three years.

On the sixth of December, 1870, the plaintiff filed an amended petition, which is in substance as follows:

That if the defendant, Horton, ever filed or located his headright certificate on the land described in this petition, that said file or location ought not and does not interpose any valid defense against the title of plaintiff; the said claim of Horton being invalid:

"1. Because the said file, entry or location of defendant, Horton, was abandoned and vacated by the withdrawal of said Horton certificate from the surveyor's office; that the said Horton's location and land certificate was withdrawn from the office of the district surveyor of Bastrop district or county, on or about the first day of July, A. D. 1838, and never was returned to said district surveyor's office, nor was it filed in any other surveyor's office nor in the the Land Office, prior to the twenty-eighth day of February, 1849, when it was filed in the office of the county surveyor of Travis county; that during said period from July 1, 1838, to February 28, 1849, there was no copy of any certificate, or any file, entry or location, record, document, or other evidence in the office of any district or county surveyor in the State of Texas showing the existence of said certificate, or that any file, entry or location of said certificate had ever been made of the said land described in the petition.

"2. The said land, upon which said file, entry or location is pretended to have been made, is situated upon the Guadalupe river, which river is, and was at the date of said alleged location, a navigable stream, of the average width of thirty feet, from its mouth up to or above the said land; that the said alleged location contained a front of more than one-half of the square thereof upon the said stream, there being at the date of the alleged file or location by Horton no other valid location or surveys preventing said location by Horton, extending back from the river Guadalupe so as to give only the legal front to said survey.

"3. The land claimed by Horton to have been located

by virtue of his said certificate was not surveyed within twelve months from the tenth day of February, 1852, as required by law, nor was the same surveyed within twelve months from the time the same was pretended to have been located by Horton, and so said location has become void and cannot be set up for any purpose as against plaintiff.

"4. If any survey was ever made by virtue of the said A. C. Horton's league certificate, for the defendant, then plaintiff shows that the field notes were not made out, recorded and returned, as prescribed by law, to the General Land Office on or before the thirty-first day of August, 1853; nor were said field notes returned to and filed in the General Land Office within twelve months from the date when the said land was surveyed, and so the said survey, and the field notes of the same, are now and have long been null and void, and that the said claim set up by Horton, and by his administrator subsequent to the death of said Horton, and by the defendants, are clouds upon the plaintiff's title.

"Plaintiff further shows that since the institution of this suit the land, by change of the county boundaries, is situated within the present limits of the county of Comal; praying for judgment annulling the said pretended claim of defendant, and the so-called files and pretended surveys, and for general relief."

The defendant, Dennis, as executor of Horton, filed another amended answer, in which he alleged that in 1838, Horton located his certificate on the land in controversy, in the surveyor's office in Bastrop land district, where the land was then situated; that since the surveyor filed said location and adopted the set of field notes made out for Henry Brown, upon application for a patent, the Commissioner refused to patent the land to said Horton, because it appeared to have been appropriated by Henry

Brown, thereupon he brought suit in the District Court of Bastrop county against Brown and the Commissioner of the Land Office to vacate Brown's title and to compel the Commissioner to issue the patent; that the District Court decided the cause against him; that he appealed from said judgment to the Supreme Court; that on the ninth of March, 1848, the cause was reversed and judgment rendered for him, and a *mandamus* ordered to issue to compel the Commissioner to issue the patent; that at the date of the last named decision Horton's certificate had been lost or mislaid; that he at once applied for and obtained a duplicate; that when he obtained the duplicate and found his original, the land, by subdivision of the Bastrop land district, became a part of the Travis land district; although it was not really necessary, he did apply to the surveyor of Travis district to survey the land, and that he refused, because the land had been located by Rowe, the party under whom plaintiff Hamilton now claims; that he then instituted suit against the surveyor of Travis for a *mandamus* to compel him to survey the land; that the suit was decided against him, because it was held that the land, as appropriated by him, did not appear to be in the shape required by law; but that such supposed defect in a survey would not vitiate a location valid in other respects.

He also filed with and made a part of his answer a copy from the records of Bastrop county in the case of Horton v. Brown, and copy of the record of the judgment of the Supreme Court in said cause, and alleged that Rowe's location upon the land was made during the pendency of the suit of Horton v. Brown, which was well known to Rowe when he located the land, and that Hamilton knew it when he purchased.

And further alleged, that by virtue of Horton's location and the judgment of the Supreme Court in case of Horton

v. Brown *et al.*, the land was dedicated to Horton and severed from the public domain; that the State had no right to the land when Rowe located it and when Hamilton got the patents; that at the time Horton made his location the land in the rear of it had been surveyed for a private individual, and was not vacant; that Horton's location was made as near the required shape as circumstances would admit.

He further alleged that he went into possession of the land in the early part of 1846; that he held open and notorious possession of the land at the time the locations were made under which plaintiff claims, and alleged that the Brown field notes were at the time of their adoption on file in the Land Office, where they have remained to the present time; that they were made by Sims, and he knew them to be correct.

On the eighth of December, 1870, the plaintiff filed a replication to the defendant's plea of the judgment in Horton v. Brown *et al.* in bar of plaintiff's right of action, and denied the validity of said judgment, because the judgment in the District Court of Bastrop county was in favor of the Commissioner of the Land Office, and had never been appealed from as against the Commissioner; that the judgment was stale, barred by lapse of time, and ten years limitation; and that the field notes alleged to have been adopted by defendants were never certified to by the surveyor Sims, to the president of the Board of Land Commissioners of Bastrop county, and afterwards certified to the Commissioner of the General Land Office for patent, as required by law; that no field notes were ever returned with the Horton certificate, approved and certified to as the law required; that the survey never had been made, or the field notes returned, as required by the act of the tenth of February, 1852, prescribing the time within which it should

be done, or as required by the Constitution of the State.

On trial the plaintiff read the patent issued to himself, as assignee of Foster, for the land described in his petition.

The defendant offered in evidence, by depositions of J. J. Campbell, surveyor of Travis county, examined copies of the A. C. Horton certificate for league and labor, and the endorsement thereon, and of the other papers accompanying the same, as set out in the answer.

Also transcript of the proceedings in the *mandamus* case of Horton v. Pace and Hamilton. (See 9 Texas, 81.)

This evidence was excluded upon objections made by the plaintiff.

The defendant further offered a certified copy of the proceedings in the case of Horton v. Brown, from Bastrop county. (See 2 Texas, 78.) The record showed, in addition to the facts reported in 2 Texas, the following agreement:

"A. C. HORTON v. HENRY BROWN. } We, the undersigned counsel of record in this case, hereby agree and consent that the appeal in this cause may be taken and prosecuted to the Supreme Court without the usual bond required in such cases by law, and that the pleadings of record in the case shall be sent up to the Supreme Court for adjudication and decision without any other statement of facts accompanying the record.

"W. P. HILL,
"Attorney for Appellant.
"J. W. BUNTON,
"Attorney for Defendant."

To this evidence plaintiff objected:

1. Because the appeal in the case had not been perfected as against the State.

2. Because the judgment is stale and barred by limitation.

3. Because the State was no party to the appeal; Borden having gained the case below, the judgment remains in force.

4. Because the judgment had not been recorded in the county where the land is situated.

These objections were sustained, and the testimony excluded.

The testimony of Bartlett Sims, the surveyor of Bastrop county in 1838, and who had made the survey for Henry Brown, sufficiently appears in the opinion.

J. R. Pace testified that he was surveyor of Travis land district in 1848, and made the survey of the Foster certificate for Dr. Rowe, in July, 1848; that at the time Rowe made the file in the surveyor's office of the Foster certificate, there was nothing in the office showing Horton's claim to the land; that when he made the survey there were many German settlers upon the land; that he told Dr. Rowe of the settlers a month or two after making the survey.

The testimony of both Sims and Pace was voluminous. Other evidence was introduced, but which sufficiently appears in the opinion of the court.

Judgment was rendered in each case for the plaintiff, canceling Horton's claim and awarding possession of the land to Hamilton.

From the judgment the defendants appealed.

The errors assigned are:

1. The exclusion of the testimony of the witness Campbell, including the evidence of the Horton certificate, the endorsement thereon, and of other transactions had concerning said location, as set out in the pleadings.

2. The exclusion of the record in Horton v. Pace and Hamilton.

3. Exclusion of the record in Horton v. Brown.

4. That the judgment was rendered for the plaintiff.

Argument for the appellant.

John Ireland, for appellant.—This suit was brought by Hamilton to recover the land described. The defendant claimed under A. C. Horton. Hamilton introduced in evidence a patent from the State, and closed his case. Dennis, the executor of Horton, set up title by location and survey.

In 1834 this land was in Bastrop land district, and in Milam's colony, and was surveyed by Bart. Sims for one Henry Brown, as a colonist. It was ascertained that Brown was not entitled to the land, and Horton located his headright certificate upon it. The Commissioner refused to patent for Horton, because it appeared to belong to Brown. Horton brought his suit against Brown and the Commissioner to vacate the Brown title and to force the Commissioner to issue the patent to him, Horton. Horton succeeded in both. (See Brown v. Horton, 2 Texas, 78.)

This suit was finally decided by the Supreme Court in 1848. In the meantime Horton had lost his certificate. He at once set about getting a duplicate, and by the time he succeeded, and in fact before the land had been thrown into Travis land district, Hamilton—or Rowe, under whom Hamilton claims—located the land in Travis district. So soon as Horton got his duplicate, and again when his original turned up, he applied to the Travis surveyor to survey the land—a work entirely unnecessary. The Travis surveyor refused to survey the land for Horton. (Horton v. Pace, 9 Texas, 81.)

Horton took possession in 1846, and remained uninterrupted till this suit was brought in 1853, say seven years. (20 Texas, 611, Horton v. Hamilton.)

A patent is a ministerial act only, and if done contrary to law it is a nullity. (Polk v. Wendell, 5 Wheat., 433; Mayor & Co. v. U. S., 10 Pet., 622; Gun v. Watkins, 7 Wheat., 27.)

Bunton had authority to take the case up by appeal. (Russell v. Randolph, 11 Texas, 461; Lindsey v. Hawes, 2 Black, 554; Lord v. Chadoin, 42 Maine; 5 Cal. R., 81; 27 Ark., 203; 9 Cranch, 99; 18 How., 87; Mr. Bower's brief in 25 Texas (Sup.), 419; Stoddard v. Chambers, 2 How., 284; Lewis v. Mixon, 11 Texas, 564; Lindsey v. Hawes, 2 Black, 554.)

Was it competent for the surveyor to adopt an old set of field notes, instead of making a new survey?

This right was not called in question in the case of Horton v. Brown, 2 Texas, nor was the right doubted by the Commissioner of the General Land Office. It was so decided in Horton v. Pace, 9 Texas,—; McGee v. Chadoin, 30 Texas, 644; Ruis v. Chambers, 15 Texas, 590; expressly held in Styles v. Gray, 10 Texas, 507.

The survey having been made before the closing of the Land Office, there was no necessity for a resurvey, under the act of 1852. (Jennings v. De Cordova, 20 Texas, 513.)

This proposition being answered in the affirmative, the case does not come within the act of 1852, nor the provisions of the late Constitution, for the reason that the field notes were already returned.

There has been all the time a location and survey on the land by virtue of a valid land certificate. There is no innocent purchaser for a valuable consideration.

Hamilton bought an equity from Rowe, and is entitled to no greater rights than Rowe had. (Spotford v. Manning, 6 Paige 383; Brown v. Anderson, 1 Monroe, 201; Pinson v. Ivry, 1 Yerger, 296; Governor v. Lynch, 2 Paige, 300.)

Notice to Pace, the surveyor, was notice to Rowe. (Corbin v. Mulligan, 1 Bush, 279.)

Horton's possession was notice to Hamilton and Rowe. (Hawley v. Bullock, 29 Texas, 216.)

A location by a valid certificate gives property, and is

within the constitutional protection. (Sherwood v. Fleming, 25 Texas Sup., 409.)

There has been no one misled in this matter. Horton's possession was notice.

The effort to have the land surveyed by Pace was simply precautionary, and a wish that the Travis land district should show the facts. (Morris v. Brinlee, 14 Texas, 288.) Horton was not compelled to have his land surveyed in Travis land district. (Howard v. Colquhoun, 28 Texas, 134.)

Such legal titles have never been permitted to overreach subsisting equities. (McGee v. Chadoin, 30 Texas, 644; Hollingsworth v. Holshousen, 25 Texas, 625; Morris v. Byers, 14 Texas, 279; Morris v. Brinlee, 14 Texas, 285; Milam County v. Robertson, 33 Texas, 366.)

The judgment and record in the case of Horton v. Brown and the Commissioner of the General Land Office should have been admitted in evidence. That judgment completely severed the land from the public domain if it had not been done by the location; and as Hamilton held under the government, he too was bound by that judgment. (Kindle v. Stokes, 3 How., 100; Loftus v. Mitchell, 3 A. K. Marsh., 1366; Bush v. Hampton, 4 Dana, 83; Reardon v Searey's Heirs, 1 Litt., 17, 53; Monogham v. Wilborn, Dallam, 626. See case of Horton v. Brown, referred to in 22 Texas, 155.)

The three years adverse possession gave title under the fifteenth section of the act of limitation. (Pas. Dig., Art. 4622; Christie v. Alford, 17 How., 600; DeLeon v. White, 9 Texas, 609; Wash. C. C., 350; Chiles v. Jones, 4 Dana, 483; Breeding v. Taylor, 13 B. Monroe, 482.)

It may be urged, as was done below, that the State cannot be bound by the three years limitation, and this position is not denied. But I say that this suit was not brought by the State. The issuance of the patent is the

mere work of a clerk. A location and survey will support a suit for land. Hence, as against the State, it was Hamilton's land from the date of his location and survey, and limitation began to run from the date of his survey in 1848. (Kimbro v. Hamilton, 28 Texas, 560, and case cited; 3 Serg. & Rawle, 290.)

The issuance of the patent to Hamilton was not an assertion of title on the part of the State. (Butler v. Coy, 9 Ben. Monroe, 315.)

Chandler & Carleton and *Terrell & Walker*, for appellee, both filed briefs.

A. J. Hamilton, for appellee, made an oral argument.

OGDEN, J.—These two cases are actions commenced in the District Court by the appellee against different parties for alleged trespasses on different portions of a certain league of land; to both of which suits A. C. Horton, as the vendor or landlord of each, made himself a party defendant, and set up a claim in himself to the entire league, and thereafter Horton is recognized as the defendant in both causes. The prosecution and defense are the same in both, and the pleadings and evidence are so nearly identical that the decision of one must settle the other. We have therefore deemed it proper to consider both cases together.

There is, however, an assigned error in cause 215, which may be disposed of before considering the merits of either. It appears, from the exceptions taken, that on the trial of that case the jury found a verdict for the plaintiff, and at the suggestion of counsel, they were instructed by the court to amend their verdict by adding "the land described in plaintiff's petition." This was an action for a specifically described tract of land, and the jury by their verdict evidently intended to give the plaintiff that land,

and their omission to say so may be considered as a clerical omission, and as such it was very properly corrected under the direction of the court. (McKeen v. Paschal, 15 Texas, 37.) We can see no valid objection to a similar amendment in the presiding judge's charge to the jury, provided the same is done in the presence of the jury and without any imputation of an improper motive.

The law has prescribed no precise form for making locations of the public lands of the State, and he who held a genuine certificate or other valid claim for a portion of the public domain might locate or file the same, at his pleasure, on any lands unappropriated, and which are not reserved from location. But in order to separate any specific tract of land from the balance of the public domain, there must be a location "sufficiently specific to identify the land which it is intended to appropriate" (Hollingsworth v. Holshousen, 17 Texas, 44), and must be made in such a manner as to notify the public of the appropriation.

In 1856 an act was passed prescribing, to some extent, the manner of making and the necessary requisites in order to constitute a valid and legal location. Previous to that time the whole matter was in a great measure controlled by instructions issued by the Commissioner of the General Land Office.

In 1838 instructions to the different surveyors of the State were issued, directing how and by whom surveys should be made, and the manner of making locations, and how the evidence of locations should be preserved and made public. These instructions were similar to the act subsequently passed by the Legislature, and were equally binding upon the surveyors and persons for whom surveys were made.

The location of the league now in controversy was made by A. C. Horton in 1838; and though the surveyor failed

to make a record entry in a book kept for that purpose, as required by the instructions from the General Land Office, yet he endorsed on the certificate the location and a reference to the land located. We are of the opinion that the endorsement then made, if sufficiently specific to point out the land located, was an appropriation of the land to the owner of the certificate, provided the same was previously a part of the public domain. But as that endorsement upon the Horton certificate was the only record evidence of the appropriation, and as the locator was required to file his certificate in the surveyor's office as a further evidence of the location, it would necessarily follow that when that certificate was withdrawn from the office there remained no evidence of the appropriation, or that the holder of the certificate still claimed the land; and a stranger would have the right to suppose that there had never been a location, or if one had been made, then that the same had been withdrawn or abandoned.

Horton located his certificate in 1838, but within a few weeks of the location withdrew his certificate, and all evidence of the location, from the surveyor's office, and kept the same out for over ten years, and until the land had been re-located by another party, and for this reason it might properly have been presumed that the file by Horton had been abandoned. (Willie v. Wynne, 26 Texas, 44; Booth v. Upshur, 26 Texas, 73.) It is, however, claimed for appellants that Horton, in 1846, and before any other location was made, took possession of the land by his tenants, and was holding the same at the time of the Rowe location, and continued so to hold the same until the institution of this suit, and that this fact was sufficient to give notice to all persons that Horton claimed the land, and also that this notice would supply any defects there might be in the records of the surveyor's office.

But it must be borne in mind that the possession of one person in itself is no evidence of the right or claim of another; and there is no evidence to bring home to Rowe or his surveyor the knowledge that the settlers upon the land, at the time of Rowe's location, were the tenants or vendee's of Horton; nor that Horton claimed the possession through these settlers, as there was no record evidence in the proper office that Horton claimed the land. Besides, it was a notorious fact that the land had once been surveyed and patented to one Henry Brown; and it would have been quite natural to suppose that the settlers on the land at the time of the Rowe location were tenants or vendees of Brown. But the Brown title, at the time of the Rowe location, had just been declared by the Supreme Court to be null and void.

It is true that the suit against Brown had been instituted and prosecuted by Horton; and had he left in the surveyor's office any evidence that he intended to claim the land included within the Brown survey, he might then have protected his location. But the fact that he was prosecuting a suit in the District and Supreme Courts to have Brown's patent canceled, could hardly be considered as evidence of his location; nor that he had not abandoned his location, since he had withdrawn his certificate and all evidence of a location from the surveyor's office, and kept them out for many years.

If it were admitted, that after a complete and specific location, the pendency of a suit in the District and Supreme Courts, wherein the locator claimed the right to appropriate the land so located, would be a sufficient notice to the public of that claim, yet it might be gravely questioned whether Horton had so perfected his location as to entitle him to the benefits of that notice. His location consisted entirely in an endorsement upon his certificate by the surveyor, "Located one league of land on

the San Antonio road, Guadalupe river, east side, on league one, this February 19, 1838;" and the suit in the Bastrop District Court was instituted for this identical league of land; yet in neither of the suits now at bar does he or his representatives claim league number one as deeded or patented to Henry Brown, as the plot and field notes of the Brown league, and the one now claimed by appellants, most clearly show. This fact might be considered as additional proof that Horton, at the time he withdrew his certificate from the surveyor's office, abandoned the location he had made on the nineteenth of February, 1838, and that the present claim was wholly the result of an after-consideration; and therefore the suit pending against Brown could hardly be considered as notice of the present claim.

Again, if we consider the endorsement made on the certificate the only location made by Horton, then we must also come to the conclusion that he failed to perfect his location by having his field notes properly certified to the General Land Office, as applied to his location, and by having them returned to the president of the Board of Land Commissioners, as required by the act of December, 1837. Indeed, we think the pleadings and evidence in both causes show most conclusively that Horton, after the endorsement on the certificate, when the same was filed with the surveyor, changed his mind as to the form of his location and the field notes to control the same; as the plat and field notes which were, soon after the filing of the certificate, sent up to the General Land Office are quite different from the plat and field notes of the Brown survey.

It was the Brown survey and the Brown field notes alone which Horton had a right to claim by virtue of the endorsement on and filing of his certificate, and when he changed his field notes, and the form of the land he wished to appropriate, then he could no longer legally

claim any benefit or right under that prior survey, nor the endorsement on the certificate, as that endorsement appropriated league number one, and nothing more. He would be required to make a new file or location, to have the land surveyed and certified under oath by the surveyor, in the same manner and form as required for the location of any other portion of the public domain. If this be a correct view of the legal rights of the parties, then appellants can have no claim to the land in controversy which the courts can recognize, as no location was made by Horton, excepting on the Brown league, and now appellants claim a different tract of land, or rather a tract bounded by different field notes which were never made by actual survey.

That Horton could have adopted the location, survey and field notes of the Brown league, repeated decisions of this court have settled beyond controversy. But we think it also well settled that when a locator adopts an old location and field notes, they must be applied to the new location by the surveyor, and certified to the General Land Office in the same manner as a new survey.

Sims, who was the surveyor for the Bastrop land district, and who made the location for Horton, testifies that he made no actual survey for Horton, and yet his plat and field notes sent up to the Land Office show an entirely different survey from that made for Brown. It would appear that Horton fully appreciated the necessity of having an actual survey made, as he brought suit against Pace, the district surveyor, to compel him to survey the land as designated by the plat made by Sims. In that case the court refused the compulsory process against the surveyor, because of the illegal form of the survey required; and there appears to have been no further efforts on the part of Horton to perfect his title or to appropriate the land until the bringing of this suit.

We think it clear that Horton, in order to appropriate the land as claimed, or to perfect his location into a title, should have had his land surveyed and the field notes returned to the General Land Office, as required for other locations, and his neglect or failure to do so has caused him to lose any right he may have acquired under his location.

Nor can the suit against Pace, or its termination, be pleaded as an excuse for not having the land surveyed and the field notes returned to the General Land Office, for he should have known that the form of his location was objectionable under the statute, and that the courts would not lend their assistance in the violation of the law. (Horton v. Pace, 9 Texas, 81.)

The act of the tenth of February, 1852, provided that "All lands heretofore located by virtue of any genuine claim to land shall be surveyed within twelve months from the passage of this act, or the location shall become null and void, and the lands subject to re-location and survey, as other vacant and unappropriated land." The same act provides that the field notes of all surveys shall be returned to the General Land Office within the same time. We are of the opinion that the location of apellant comes strictly within the object and purview of the act cited, and that Horton was bound by that act to have his survey and field notes returned to the General Land Office within the time prescribed, or lose the benefit of his location. He has failed to make any return as required, and the appellee, or his vendor, having made the location on the same land, and having complied with the statute, has received a patent for the land, and we are unable to discover any legal grounds for depriving him of the fruits of his industry and diligence. (Upshur v. Pace, 15 Texas, 531; Patrick v. Nance, 26 Texas, 297; Crow v. Reed, 25 Texas Sup., 392.)

We are also of the opinion that the claim of title, by three years' possession, cannot avail the appellant, since, if he has no title, his possession for three or five years could hardly avail him. And besides he has proven possession of but a small and distinct portion of the league, and that portion may, or may not, be on that portion appropriated by the patent of appellee. For the reasons herein given, and for the further reason that the judgment in the case of Horton v. Brown *et al.*, from Bastrop county, had never been recorded in the county where the land is situated, we think the court did not err in sustaining the objection to the introduction in evidence of the record in that case. That case was taken to the Supreme Court with irregularity at least, and the fact that no efforts were made to enforce the same against the Commissioner of the General Land Office shows pretty conclusively that no confidence was placed in the validity of that judgment against the Commissioner.

From the view of the law of these cases, as here taken, it is clear that Horton, at the time of the location by Rowe, had no valid location upon the land in controversy, which would authorize him to contest the location and patent of Rowe and his assignee.

It is further clear that if, at the time of the location by Rowe, Horton's location was good and subsisting, yet his failure to have his land surveyed, and the field notes returned to the General Land Office, as provided by the act of February, 1852, has caused him to lose any right he may have acquired under his original location.

We think it also clear that the claim of appellants, as set up in these cases, is in direct conflict with the positive declarations of Article 10, Section 2, of our present Constitution, which declares, "that all surveys of land heretofore made and not returned to the General Land Office, in accordance with the act of 1852, shall be null and void."

The location, as now claimed by the appellants, was never surveyed, nor were the field notes ever returned to the Land Office as required by law, and the same must now be considered null and void; and therefore the rulings of the District Court, on the introduction in evidence of the record, in the case of Horton v. Pace and Hamilton, or the documents referred to in Campbell's depositions, become wholly immaterial, as they in no way could affect the invalidity of that location.

And the judgments in both cases are therefore affirmed.

AFFIRMED.

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37a 542

EX PARTE WM. RUST ET ALS.
EX PARTE JOHN IRELAND ET ALS.
EX PARTE HENRY MANEY.

1. When a person is charged with a contempt of court, which is not committed by act in the presence of the court or so near it as to interfere with the administration of justice, no final punishment should be assessed against him until after he has been cited to show cause why he should not be punished for contempt, and notified by the citation of the matter charged against him.
2. A party cited to show cause why he should not be punished by the District Court for filing an offensive brief or paper, may rest upon his exceptions to the sufficiency of the citation, if it fails to charge that he wrote, signed or filed the offensive brief or paper.
3. A judgment of the District Court imposing a fine for contempt, which purports to have been rendered on a day when the court held no session, is void.
4. And a judgment rendered on return of *scire facias* to the party charged, requiring him to show cause "why he should not be fined as he had before been" by said void judgment, is also void.

A day having been fixed in vacation by the Hon. Henry Maney to hear argument on a motion to dissolve injunctions issued to restrain the collection of the one per cent.

school tax, a paper was, on the second of May, 1873, handed by one of the parties signing the same to the clerk of the District Court, but with no instructions to file, of which the following is a copy, the legal argument being omitted:

"JOHN IRELAND v. JOHN F. GORDON. 1987
A. W. DIBRELL v. JOHN F. GORDON. 1988
P. W. HARDEMAN v. JOHN F. GORDON. 1994

In District Court of Guadalupe County.—Petition for Injunction.

"In these several cases plaintiffs rely on a perpetuation of the injunction upon the following grounds: * * *

"Your honor presided at a political meeting in Seguin, on Saturday last, at which the following resolution was passed, viz.:

"'*Resolved*, That we hereby utter our unqualified condemnation of those who, by injunction or otherwise, have sought to hinder the onward progress of the free school system, and through political hatred and partisan prejudice have sought to starve the infant mind, and stamp on God-given intellects the curse of ignorance. We call on the people of the State to rise in their might, and rebuke in thunder tones those who would enthrall the mind of the rising generation in darkness and ignorance, for the purpose of continuing their despotic rule; for where learning and intelligence reign, independence and republicanism reign supreme.'

And while it is not our purpose to discuss the merits of said resolution, nor make commentary on the action of your honor, yet we deem it our duty to say that as your honor neither entered your protest nor vacated your posi-

tion, that resolution must have met with your approval. We therefore decline to argue the cases, believing that the dignity of the profession demands that course, in view of the fact that the judgment of the court seems to have been concluded upon a great question of constitutional and statutory law by a partisan meeting, and because at the forum, while we spoke to the judge, we could not fail to see the politician under the ermine.

(Signed) "WM. M. RUST,
"JOHN IRELAND,
"W. E. GOODRICH,
"JOHN P. WHITE,
"ALEX. HENDERSON,
"W. H. BURGESS,
"W. P. H. DOUGLASS."

On the eighth day of May, 1872, the above named attorneys applied to the Hon. L. D. Evans, Chief Justice of the State, for a writ of *habeas corpus*, alleging that they were restrained of their liberty by John F. Gordon, sheriff of Guadalupe county.

Upon return of the writ, the relators were discharged from custody, on the ground that the warrant of arrest under which they were held disclosed upon its face that it was issued on the third of May, 1872, "in vacation," and required the imprisonment of the attorneys, in default of the payment of a fine of one hundred dollars each, for a contempt.

On the discharge of the parties a madate was issued by this court to the sheriff and District Court of Guadalupe county, which contained the order releasing the prisoners, and required it to be "in all things duly recognized, obeyed and executed."

On the third of June, 1872, *scire facias* was issued to William M. Rust, and each of the other attorneys, in

term time, by order of Judge Maney, requiring them to appear before the District Court of Guadalupe county on Monday, the tenth day of June, A. D. 1872, to show cause, if any they had, why they should not be fined, as they had been before, in the sum of one hundred dollars, for contempt of the District Court of Guadalupe county, "shown in and by a brief filed in causes Nos. 1987, 1988 and 1994."

On the seventh day of June, 1872, two of the attorneys (White and Ireland) applied to the Supreme Court for a citation against Judge Maney, requiring him to show cause why he should not be punished for contempt in refusing to obey the mandate of this court. They alleged in their application that after the issuing of the mandate from this court in the former proceeding, Judge Maney had directed the issuance of execution and the seizure of their property, which was then advertised for sale, to satisfy the fine for contempt imposed in May.

That application was endorsed, "Refused, June 8, 1872. EVANS, Presiding Justice."

June 11, 1872, Wm. M. Rust and the other attorneys applied to the Supreme Court again for a writ of *habeas corpus*, alleging that they were illegally restrained of their freedom by one Baumgarten, who alleged that he was acting under a verbal order from Judge Maney.

Another writ of *habeas corpus* was awarded.

The return to this writ was made by John F. Gordon, sheriff of Guadalupe county, who stated in his return that the applicants for the writ were committed to his custody by verbal order of the honorable District Court of Guadalupe county, while in session, for contempt; that he took said parties by virtue of said order, and also by virtue of orders entered on the minutes of said District Court on the tenth day of June, 1872.

The order of the District Court referred to in the return

recited with reference to each applicant for the writ, that he had been cited to show cause, if any he had, "why he should not be fined, as he had been before, in the sum of one hundred dollars for contempt of the District Court of Guadalupe county, shown in and by a brief filed in causes 1987, 1988 and 1994, on the second of May, 1872," etc.; "and it appearing to the court that said ———, Esq., is in contempt of this court; therefore it is ordered, adjudged and decreed by this court, that said ———, Esq., be committed to the custody of the sheriff of Guadalupe county, there to remain until he shall have paid the fine of one hundred dollars adjudged against him on the second day of May, 1872, and now adjudged against him," etc.

Upon the case thus presented, after hearing evidence, judgment was pronounced on the fourteenth day of June, 1872.

No briefs on file for either party.

WALKER, J.—It is a matter of personal regret to the members of this court that our jurisdiction should have been twice invoked to relieve the relators from the restraint of their personal liberty.

Looking at the record filed in this case, we learn that on the third day of May, 1872, the relators were condemned to pay a fine of one hundred dollars each, in punishment of an alleged contempt of the District Court, presided over by the Hon. Henry Maney. And we are judicially informed that in default of payment of the fines so assessed against the relators, they were severally committed to the custody of the sheriff of Guadalupe county.

The relators made their complaint to this court, and prayed for a writ of *habeas corpus* on the ground of an illegal imprisonment. They were brought before us, and on examination had before this court they were discharged

on the ground that there was no District Court sitting in Guadalupe county on the third day of May, 1872, and that all proceedings purporting to be had before the District Court of said Guadalupe county, of that date, were null and void.

It now appears that on a day in term, to-wit, the tenth day of June, 1872, the following proceedings were had in the District Court of Guadalupe county, to-wit:

"EX PARTE JOHN IRELAND.

"John Ireland, Esq., having been required, on the third day of June, A. D. 1872, to appear before the District Court of Guadalupe county on Monday the tenth day of June, A. D. 1872, to show cause, if any he had, why he should not be fined, as he had been before, in the sum of one hundred dollars for contempt of the District Court of Guadalupe county, shown in and by a brief filed in cause No. 1987, and styled John Ireland v. John F. Gordon; and cause No. 1988, styled A. W. Dibrell *et al.* v. John F. Gordon, sheriff; and cause No. 1994, styled P. W. Hardeman *et al.* v. John F. Gordon, sheriff Guadalupe county, on the second day of May, 1872; and having on this, the tenth day of June, A. D. 1872, filed his answer, and it appearing to the court, after hearing his answer and testimony adduced in support thereof, that said John Ireland, Esq., is in contempt of this court; therefore it is ordered, adjudged and decreed by the court, that said John Ireland, Esq., be committed to the custody of the sheriff of Guadalupe county, there to remain until he shall have paid the fine of one hundred dollars adjudged against him on the second day of May, A. D. 1872, and now adjudged against him, and all costs in this behalf incurred."

Thus it will be seen that the proceedings of May 3 are made the foundation of the subsequent proceeding of

June 3, 1872. But this court, on the ninth day of May, 1872, declared the proceedings of May 3 void, and issued the following *mandate:*

"THE STATE OF TEXAS

"*To the District Court of Guadalupe County, and John F. Gordon, Sheriff of said County, greeting:*

"Before our Supreme Court, on the ninth day of May, 1872, the applicants, upon petition for *habeas corpus*, in the case *Ex parte* John Ireland, W. P. H. Douglass, John P. White, W. M. Rust, W. E. Goodrich, W. H. Burgess and Alex. Henderson, to revise or reverse your judgment in relation to said parties was determined, and therein our Supreme Court made its order in these words:

"'No. 1085. This day came the sheriff of Guadalupe county, in obedience to the writ awarded in this cause, and brought with him the prisoners, John Ireland, W. P. H. Douglass, John P. White, W. M. Rust, W. E. Goodrich, W. H. Burgess and Alex. Henderson, and having made his return writ, George F. Moore and W. M. Walton, Esquires, appeared in behalf of the applicants, and B. Trigg, Esquire, District Attorney Twenty-seventh Judicial District, appeared in behalf of the State; and the petition of the appellants, the writ and return, with the evidence introduced, having been submitted to the court, because it appears to this court that said applicants are illegally restrained of their liberty; it is ordered by the court, that they be discharged from the custody of the sheriff of Guadalupe county, and that they be restored to their liberty; and this decision be certified below for observance.'

"Wherefore we command you to observe the order of our said Supreme Court in this behalf, and in all things to have it duly recognized, obeyed and executed.

"Witness the Hon. Lemuel D. Evans, Presid-
[SEAL] ing Judge of our said Supreme Court, with the seal thereof annexed, at Austin, this ninth day of May, A. D. 1872.

"W. P. DE NORMANDIE, Clerk."

The proceeding of June 10 then is a proceeding to compel the payment of a fine which this court had previously declared void, and is in violation of the mandate of this court.

Had the relators continued in contempt of the District Court, and been properly cited to purge themselves of the contempt, their answers under oath might have purged the contempt. (See The State v. Coulter *et al.*, Wright's S. C. Rep. of Ohio, p. 421.)

It may not be improper here for us to say that we do not regard it as our province to set at naught the judgments of the District Courts for any other cause than legal irregularities.

We believe it to be the true practice, when a person is charged with a contempt of court, that before any final punishment should be assessed against him, a citation should issue containing substantially the matter charged against him, and calling on him to show cause why he should not be punished for the alleged contempt. This rule, however, should not interfere with the right of the court to order the arrest or fine of persons for misbehavior, by act or word, in the presence of the court, or so near thereto as to obstruct or interfere with the administration of justice.

Had the offensive paper alluded to as a brief been upon the files of the court at the commencement of this proceeding, it might have been regarded as a gross contempt of the court, and have formed the basis of a proceeding *de novo* to punish the relators for such contempt; but such appears not to have been the fact, nor was this a

proceeding *de novo* to punish for a contempt actually committed against the court. But it was a proceeding to enforce, by the penalty of imprisonment, the payment of a void judgment, and is therefore void.

The relators will be discharged from custody, but we deem it only proper to condemn them to pay the costs of this proceeding in this court.

RELATORS DISCHARGED.

On the twenty-sixth day of June, 1872, a writ of *habeas corpus* was again issued by L. D. Evans, C. J., on the application of Wm. M. Rust and the other attorneys, alleging that they were illegally restrained of their liberty by the sheriff of Guadalupe county.

The return of the sheriff to this writ is voluminous. It shows the following facts: On the eighteenth day of June, 1872, upon order of Judge Maney, the District Court of Guadalupe county being in session, *scire facias* was issued and served on the attorneys who had signed the brief or note of May 2, 1872, requiring them "to appear forthwith and show cause why they should not each be fined in the sum of one hundred dollars for a contempt of the said District Court of Guadalupe county, committed by reason of a certain brief or paper, offensive to said court in its language and terms, and now on the files of this court in causes," etc.— "being in words and figures following, to-wit:" * * * * * *

The parties excepted in the District Court to the sufficiency of the writ of *scire facias*, because: 1. The writ did not allege or disclose the contempt with which the respondents were charged.

2. It nowhere alleged that respondents wrote, signed, or in any manner sanctioned the paper complained of, or that they had any connection with the execution or filing of the same.

3. Because it was indefinite, uncertain and insufficient, and failed wholly in complying with the legal requirements to set forth substantially the matter charged against them.

They plead, in bar to the proceedings, the fact that executions had issued and were then levied on property advertised for sale to pay a fine of one hundred dollars on each of them, formerly imposed for the same contempt alleged in the *scire facias;* also, the judgment of this court of the fourteenth of June, 1872.

In their answers they denied, under oath, that they had ever been guilty of a contempt of "the District Court of Guadalupe county," as charged; and also denied that the brief or paper referred to was ever intended to be used in the District Court of Guadalupe county in term time; that no brief or paper such as the one referred to in the *scire facias* was then on file, or was on file when the order for the *scire facias* was made, or had been on file since the beginning of the term; that if any such paper had been on file since the term began, then the same had been formally withdrawn from the files by an instrument of writing signed by respondents—except Ireland—in the following words:

"JOHN IRELAND v. JOHN F. GORDON. } 1987 } Suit pending in District Court of Guadalupe county.

"Whereas, in the above entitled cause, and also in A. W. Dibrell *et als.* v. John F. Gordon, sheriff, No. 1988; and also in 1994, P. W. Hardeman *et al.* v. John F. Gordon, sheriff of Guadalupe county (all suits pending in the District Court of Guadalupe county, Texas), we, the undersigned, together with John Ireland and W. M. Rust, attorneys for the parties plaintiffs, did, on the second day of May, 1872, hand to the deputy district

clerk of Guadalupe county a paper, document, or brief, upon which he endorsed 'filed,' and placed the same among the papers in said causes; and whereas said paper, document, or brief, has fully accomplished and subserved the purposes for which it was intended, save that of satisfying the judge of the correctness of the legal position therein maintained; and whereas said paper, document, or brief, is a private paper belonging to us, the undersigned, and in no legitimate way a paper belonging to, or part of the records in said causes: now, therefore, we do hereby withdraw said paper, document, or brief, from the files and records of the causes above named.

"ALEX. HENDERSON, Attorney.
"JOHN P. WHITE, Attorney.
"W. P. H. DOUGLASS, Attorney.
"W. E. GOODRICH, Attorney.
"W. H. BURGESS, Attorney."

The return of the sheriff further stated, that after the respondents had answered in the District Court, touching the alleged contempt, they were each, on the twenty-fifth day of June, 1872, fined in the sum of one hundred dollars by said court (the Hon. Henry Maney presiding), and were committed to the custody of said sheriff until said fine was paid.

On the hearing in the Supreme Court the attorneys filed, under oath, a statement that the paper styled a brief, of date May 2, was not filed by them, but by the order of the Hon. Henry Maney, District Judge of Guadalupe county, seven days after the service was made on them of the rule issued, and in opposition to their objection to its being so filed.

They further stated, that the obnoxious paper complained of was not copied from the original paper styled a brief, signed by them, but from a newspaper, the editor of which copied it from another newspaper, and they did

not know whether it was a correct copy of a paper once signed by them or not.

Hancock & West, and *Terrell & Walker*, for relators.—1. By the statute of the State regulating proceedings under writs of *habeas corpus*, this court takes original jurisdiction of the case and passes on all pertinent matter that may be presented, irrespective of former adjudication by another tribunal. (See act of 1857 regulating *habeas corpus*; Paschal's Digest, p. 489, Art. 2631; Id., p. 489, Note 703; Id., p. 491, Art. 2648.) This last article contains the only limitation on the power of the court to discharge, and that is after indictment found.

2. The respondents, by their sworn answers, purged themselves of any supposed contempt, and thereby divested the court of any power or jurisdiction to punish therefor. (2 Cooley's Blackstone, p. 287; Adams v. Haskel, 6 Cal. R., p. 316; case of Austin *et als.*, 5 Rawle R., 203; 2 Gall. R., p. 312; 63 North Carolina R., p. 408; 8 Ohio State R., p. ——; *Ex parte* Neel, 4 English R., p. 269; *Ex parte* Norton, 10 Mich., p. 208; *Ex parte* Curtin, 3 Minn., p. ——; *Ex parte* Jenkins, 2 Wal. Jr., p. 536 or 587; *Ex parte* Rowe, 7 Cal. R., p. 181; State v. Starte, 7 Iowa, p. 50 or 503.)

3. Even libels on the judge of a court as a man and officer, though published in a newspaper, are not punishable as contempt. (Dunham v. The State, 6 Clark, Iowa, p. 245.)

4. An order of court inflicting punishment for contempt should state the facts on which it is founded. (*Ex parte* Field, 1 Cal. R., p. 187; *Ex parte* Rowe, 7 Cal. R., p. 175.)

5. By the statute (Paschal's Digest, p. 344, Art. 1409) contempt may be punished by a fine not exceeding one hundred dollars, and by imprisonment, in the discretion

of the judge, not exceeding three days. The respondents have now been in custody ten days. (Paschal's Digest, p. 567, Note 802; State Constitution, Bill of Rights, § 15; Coughlin v. Ehlert, 39 Mo. R., 285.)

WALKER, J.—The case of Jordan v. The State was decided prior to the enactment of our statute regulating proceedings in *habeas corpus*. (Art. 2631, Paschal's Digest.)

Our Supreme Court was probably governed by the decisions in New York and Pennsylvania, in the decision of the case.

An issue is now made up, upon the return, in which the return may be controverted or avoided by new matter. By the common law, the return was conclusive until new matter was alleged in avoidance. By our statute the return is considered as controverted, whether new matter be alleged or not; and the rights of the applicant are thus enlarged.

It becomes the duty of the court to examine the case *de novo*.

A case of this kind is *quasi* criminal, and the strictness of pleading in criminal cases applies to it; whatever issues of law or fact are presented are to be tried by the court *de novo*. (Hurd, Hab. Corp., 299.)

There is no doubt but courts of justice have inherent power to punish contempts of their rules and orders, or any disturbance of their deliberations; yet nice questions have arisen as to the power of appellate courts, in revising the action of inferior tribunals in punishing for contempt.

Under our statute there can be no material difference in the power of the appellate court, whether the case comes before it on appeal, or by *habeas corpus*. The law was correctly laid down in our former opinion in this case,

and we now proceed to inquire whether the rule as laid down has been pursued.

The rule against the relators in this case is a rule to show cause why they should not be fined for a contempt of the District Court of Guadalupe county—for what? "By reason of a certain brief or paper, offensive to said court, in its language and terms, now on file in this court," etc., etc. Then follows what purports to be a copy of the "offensive brief or paper;" but the citation nowhere charges that the relators, or any of them, wrote, signed, or filed the offensive brief or paper.

There is no cause of contempt then set out, and this citation is the writ to which the relators were bound to answer. They excepted to its sufficiency and answered. They might have rested upon their exception, for they are charged with no contempt, and there was nothing for them to answer.

But let us examine this paper for a moment in the light of the history it has made for itself. Certain causes were to be argued before the Hon. Henry Maney, at chambers, on the second day of May, 1872. These causes presented questions concerning the validity of a public law, about which an intense excitement had grown up and existed throughout the State. Before the argument the Hon. Henry Maney attended a political meeting and presided over its deliberations. At this meeting the questions involved and pending in his court were discussed, and resolutions passed denouncing not only the opinions but the persons who entertained opinions antagonistic to the views and opinions of the meeting.

It seems the president of the meeting continued throughout to occupy the chair, and entered no dissent to the passage of the resolutions.

These resolutions were conclusive against the views and opinions which the relators, no doubt, intended to pre-

sent to his honor on the argument of their causes. Seeing, as it would appear, their causes prejudged at the hustings, we may suppose they wrote the paper which has become the gravamen of their offense; and this is a paper of not very distinctive character. It is somewhat difficult to tell whether it was intended as a brief, to be filed in the causes set for argument, or whether it was merely a letter addressed to the judge, giving reasons why the relators would not appear before him to argue their causes. There is no doubt they were incensed at the conduct of the judge. They thought he had soiled the ermine by dabbling in party politics at the very time and touching the very questions which they were going to argue before him, and which they had a right to argue to an unprejudiced mind, free from bias and preconceived opinion. They considered themselves offended, and, as they say, without a compromise of professional dignity, they could not appear before him to argue questions prejudged from the stump which should only be considered from the bench.

Doubtless the relators intended to snub the judge; they would give him a Roland for his Oliver. This does appear to be about the manner in which matters proceeded until the judge commenced proceedings against the relators for a contempt of his court.

Twice before we have discharged these relators from arrest and imprisonment growing out of this offensive paper.

And now the relators deny, under oath, that they ever intended the said paper to be used for any purpose in the District Court of Guadalupe county. They virtually confess some connection with the paper in their answers, but these answers being under oath, if not contradicted by the paper itself or other evidence, must be taken as true. It is a fact well known to this court that it is not the customary practice for attorneys to appear by brief in the District Courts, and if the paper referred to is to be re-

garded as a brief, there is nothing repugnant to truth in the supposition set forth in the answers that the paper was not intended to be used in the District Court. Truth and reason compel us to regard it rather in the light of a notice to the district judge, assigning reasons why the relators would not appear before him at his chambers on the second of May to argue their causes. We do not propose to shield the relators from the charge of professional impropriety, yet it does appear to us that the whole proceeding in the commencement is to be regarded rather as a quarrel between the judge and attorneys out of court, on the hustings, through the newspapers and other public channels, rather than as a proceeding properly connected with the business of the District Court of Guadalupe county.

Whilst we would uphold in every proper case the dignity of the courts, with even jealous care, we do not propose to give aid or sanction to any proceeding under the sacred name of justice which has purely for its object and end the carrying out of personal or political quarrels. The high dignity of courts must be respected on the one hand and the rights of the citizen on the other. The judicial office must neither be degraded by the bar nor prostituted by the bench. If persons have private quarrels they must not avail themselves of official standing or position to gratify or avenge them.

A very noticeable fact in the proceeding now before us is to be considered.

At the time the citations were issued against the relators "the offensive brief or paper" was not actually on the files of the District Court of Guadalupe county. It is a fact known to us that the paper complained of had been brought into this court and offered in evidence by the district attorney on a former hearing in this case, and now it appears that copies of the paper are placed upon the files

by order of the district judge as a basis for this proceeding, and about the same time the relators file a paper in the District Court of Guadalupe county formally withdrawing the "offensive brief," and claiming it as a private paper not belonging to the records. This they had a right to do, unless the judge considered the paper his private property, which he appears to have done, so far at least as to withdraw it from the files and place it in the possession of the district attorney of Travis county, where it is last heard from. If the judge had a right to regard the paper as his private property, the relators nevertheless had a right to withdraw and disclaim anything it might contain offensive to the feelings of the judge or the dignity of the court.

We wish this case disposed of now and forever. We cannot fail to discover the *quo animo* of parties, and that it is but an attempt to gratify personal ill-will, through the power and agency of the courts on the one hand, aggravated and urged on by newspaper comments and ill-timed resentment on the other.

So far as this court is concerned it cannot give sanction to any such proceeding. The relators are discharged.

RELATORS DISCHARGED.

EVANS, C. J., *dissenting*.—The respondents are held in custody by the sheriff of Guadalupe county by virtue of an order of the District Court of that county made on the twenty-fifth day of June last.

The record discloses, that on the eighteenth of June, 1872, the District Court of Guadalupe county caused a notice to be served on the respondents to appear and show cause why they should not be fined for a contempt of the said court, "committed by reason of a certain brief, or paper, offensive to said court in its language and terms, and now on file in this court."

The brief, or paper, the filing of which was the basis of the notice to appear and show cause, was fully set out in the notice.

The respondents appeared and answered.

Their answers were not satisfactory to the court, and they were condemned by the court to pay a fine of one hundred dollars each, and were placed in the custody of the sheriff until the fines and costs were paid.

The writ of *habeas corpus* was awarded on the twenty-sixth of June, and the sheriff made his return on the first day of July.

To the return of the sheriff the respondents answered by a statement, under oath, "of matter of fact which they believed necessary to the proper exercise of this court's jurisdiction."

To this statement it is only necessary to say, that the respondents, having been adjudged guilty of a contempt by the District Court of Guadalupe county, cannot purge themselves of that contempt in this court. The only question in this court then is as to the correctness of that judgment.

We cannot look beyond that. The record of the proceedings in the District Court of Guadalupe county is brought before us as evidence in this case. That record sets out the contemptuous matter which the respondents were called upon to answer. If the record did not set forth the facts constituting the contempt of which the respondents were adjudged to be guilty, this court would be concluded by the judgment of the District Court. But as the facts are set forth in the record, it is competent for this court to consider them, and to determine whether they amount to a contempt or not.

The principles upon which courts of justice proceed in the punishment of contempts have been so frequently discussed that we deem it unnecessary to enter into an

exposition of them in the present case. The respondents are all members of the bar; and while it is due to the occasion that I should express my opinion with emphasis, I desire to discharge that duty in as few words as possible.

I am clear in my opinion that the respondents were rightly adjudged guilty of a contempt of the District Court of Guadalupe county. The record shows that the "brief, or paper," the filing of which on the second day of May, 1872, constituted the contempt, set forth in the rule to show cause, was handed by one of the respondents to the deputy clerk of the District Court. The paper was in the proper form of a brief in three causes then pending in the court. The deputy supposed that it was given him to be filed, and he filed it. The paper was insulting to the judge, and calculated to bring the court into disrespect with the people.

I feel constrained to say that the whole conduct of the respondents towards the court, since the original filing of the brief, displays a determined purpose to maintain an attitude of disrespect towards the court.

The paper filed on the seventeenth of June, purporting to withdraw the brief filed on the second of May, was scarcely, if at all, less offensive in its tone and language than the brief itself, and would fully justify the court in requiring respondents to withdraw this offensive language in fit and apt words, by the process of contempt. In the answers of the respondents to the rule to show cause there is studied evasion and a design to wound. And yet this court comes to the relief of the respondents, and excuses their conduct upon grounds not disclosed by the record. If the facts relied on in the opinion of the court in excuse of the attorneys be true, surely they should have been set out in their answers at the proper time. But they are not.

We would, in my opinion, be wanting in duty if we

failed to characterize the conduct of the respondents as a violation of their professional duty to the court.

It is equally a violation of a duty which they owe to themselves and to the profession of which they are members—honorable members all—and some of them able, experienced and distinguished members.

The country has not recovered from the shock of a great war. There are impediments to the administration of justice to be found in the prejudices which grow out of and are fostered by the contests of political parties. There are, doubtless, cases of indiscretion, resulting from inexperience or other causes, on the part of those who have been called to the discharge of judicial duties. This is to be lamented. But the duty of the members of the bar is a plain one. Their learning and professional training should supplement, if need be, the inexperience of the bench.

They should never allow themselves to be betrayed by passion or resentment into the formation of combinations to destroy or impair the authority of the bench.

I cannot concur in the judgment of the court.

On the fourteenth of November, 1872, the former relators again applied to this court for a rule on Henry Maney, to show cause why he should not be punished for refusing to obey the former mandates. They alleged, under oath, that on the eleventh of November, 1872, the Hon. Henry Maney, presiding at a session of the District Court of Guadalupe county, refused to permit said attorneys to appear for their clients, until the former alleged contempt committed was purged; that he refused to permit the mandates and opinion of this court, touching such alleged contempt, to be read, remarking that he had a copy of them, etc.

In response to the *scire facias* issued by this court,

Answer of the respondent.

Henry Maney, on the twenty-ninth of November, 1872, answered, under oath, that no act done by him was performed with any intention of showing contempt to this court. The rest of his sworn answer is by way of argument, and is too voluminous for insertion in full.

RESPONDENT'S ANSWER.

* * Respondent most respectfully submits, that the jurisdiction of this or any other court means its power to hear and determine a cause. The decree or mandate of the Supreme Court, when rendered in the exercise of its appellate jurisdiction, becomes, to the District Court from which the appeal was taken, the law of that particular case; and the court has power in such case to enforce the execution of its mandate. (Banton v. Wilson, 4 Texas, 404; and Art. 5, § 3, State Constitution, p. 23.)

Section 3 of Article 5 of our State Constitution confers and defines the jurisdiction of this honorable court. From this section, and repeated decisions of this court, it seems clear that this court has no power to do anything else than to exercise its appellate jurisdiction in such civil cases as are properly brought here from some of the inferior courts, and in such criminal cases as some judge of this court shall permit to be brought here, because, upon inspection of the transcript of the record, he believes some error of law has been committed by the judge before whom such case was tried, and to enforce both its appellate and original jurisdiction by such writs as are proper and necessary, and to grant the writs of *habeas corpus* and *mandamus*. (*Ex parte* Colin De Bland, Dallam's Digest, p. 406; McFarland v. Johnson, 27 Texas, 108.)

In granting the writs of *habeas corpus* and *mandamus* and hearing the application or petition, this court exercises its original jurisdiction, which is co-extensive and

Answer of the respondent.

concurrent with and in no respect different from that exercised by the District Courts of this State, or any one of the judges thereof.

* * * It seems clear that it was not necessary or required by the provisions of our criminal procedure, touching *habeas corpus*, for this court to have certified its judgment or mandate in said cause No. 1127, to the District Court for observance, for the plain reason that this honorable court and the District Court of the Twenty-second District, as to the subject matter adjudged, had by the Constitution original jurisdiction, co-extensive and concurrent. * * * * * * * * *

Our criminal procedure is specific in its provisions as to the exercise of the appellate jurisdiction of this honorable court in *habeas corpus* cases.

* * * What purpose could be accomplished by certifying the judgment to the court *a quo* for observance, when the statute provides for its being executed by notice to the officer having the party in custody, or the sheriff of the proper county? And if it be true, as stated in Articles 2585, 2586, 2587 and 2588, and by this honorable court in McFarland v. Johnson, 27 Texas, 105, that the end and object of the writ of *habeas corpus* is prompt relief from personal restraint, surely, when the relief sought has been obtained, the writ has performed its office. Judgment of the Supreme Court in *habeas corpus* is, by Article 3225, final and conclusive, and acts upon nothing else except the illegal restraint complained of. And there is, therefore, nothing left to be done or to be observed by the court *a quo*. The Supreme Court itself is vested by the Constitution with power to enforce its own jurisdiction. Respondent knows of no case wherein a court or judge of this State, hearing an application under *habeas corpus*, whether exercising original or appellate jurisdiction, has ever assumed to do more

than to discharge, remand or admit to bail. (Republic v. W. D. Bynum, Dal. Dig., 376; and Holman v. Mayor of Austin, 34 Texas, 668.)

* * * Courts are the exclusive judges of contempts shown them (Holman v. Mayor of Austin, 34 Texas, 608); and for this reason, among others, no appeal is permitted from a judgment of conviction for a contempt. (Floyd v. State, 7 Texas, 215; Crow v. The State, 24 Texas, 12; Casey v. The State, 25 Texas, 380.)

Respondent further says, that there are outstanding five judgments against each of said applicants in said cause No. 1127; that up to this time respondent believes that these attorneys, against whom the five fines, of one hundred dollars each, have been adjudged for contempt of the District Court of Guadalupe county, have failed, as they are each required to do, to pay anything towards the satisfaction of said judgments of conviction; and therefore this respondent says, that at the November Term, A. D. 1872, of the District Court of Guadalupe county, your respondent called the attention of said attorneys to the fact that they were, by these several judgments, convicted of a contempt of court, and that so long as said judgments remained unpaid, or until they filed in the District Court of Guadalupe county a true copy, or substantial copy, of their response to the return of the sheriff filed in cause No. 1127, *Ex parte* John Ireland *et al.*, that the District Court of Guadalupe county could not permit them to practice as attorneys in it.

If it be true that a court is to judge exclusively for itself of a contempt committed against it, then the said attorneys were convicted of contempt and fined before the rendition of the mandate or judgment in cause No. 1127, *Ex parte* John Ireland *et al.*; and said contempt has never been purged, nor have said attorneys paid into court the fines, nor in any other way satisfied said judg-

ments of conviction for contempt. And therefore respondent says that the Judge of the Twenty-second Judicial District was, by reason of the respect demanded by the law, from attorneys as well as others, to be shown the District Court of Guadalupe county, constrained to "turn a deaf ear" to all applications coming from said attorneys to said court, except such as involved matters of right. (Johnson v. Pinney, 1 Paige, 646; Lane v. Ellzey, 4 Hennig & Mumford's Reports, 504.)

Respondent further says, that this honorable court only has superintendence and control over inferior courts, by the issuance of proper writs, to enforce its appellate and original jurisdiction. (McFarland v. Johnson, 27 Texas, 108.)

On the day after the filing of respondent's answer, the following opinion was delivered:

OGDEN, J.—On the twenty-second of July, 1872, the relators were brought before this court on a writ of *habeas corpus*, and, on an investigation of the case, it was found that they had been committed by the Hon. Henry Maney, District Judge of the Twenty-second Judicial District, for an alleged contempt of the District Court of Guadalupe county. This court, in the opinion delivered in that case, declared that "the relators were charged with no contempt;" and as they were charged with no contempt, no legal judgment could be entered up against them, and they were, therefore, discharged.

The mandate which issued upon the judgment in that case enjoined all further proceedings against the parties for the supposed contempt.

It now appears, from the petition of the relators, and the answer and confession of the respondent, that he, as the Judge of the Twenty-second Judicial District, has dis-

regarded the judgment and mandate of this court, and, in violation of said mandate has attempted to enforce, in a manner wholly unknown to our law, that pretended judgment of his court, which, in effect, had been declared by this court null and void. We are therefore constrained to hold the said Henry Maney, judge as aforesaid, in contempt of the judgment and mandate of this court.

It is therefore ordered and adjudged by this court, that the Hon. Henry Maney, Judge of the Twenty-second Judicial District, be and he is hereby fined in the sum of one hundred (100) dollars, for a contempt of the judgment and mandate of this court.

And it is further ordered, that the said Henry Maney, judge as aforesaid, do abstain from any further hindrance of the relators, or interference with their right to practice law in any of the courts of Texas to which they have been legally admitted, by reason of any supposed or pretended contempt of the District Court of Guadalupe county, for which they had been arrested, and were discharged from arrest by the judgment of this court, on the twenty-second day of July, 1872.

It is further ordered and adjudged, that the said Henry Maney pay all cost of this proceeding.

ORDERED ACCORDINGLY.

On the seventeenth of March, 1873, in another proceeding at the suit of the former relators, the following judgment was rendered by this court:

"An information having been filed in this court on the seventh day of March, 1873, complaining of the Hon. Henry Maney, Judge of the Twenty-second Judicial District, that he is in contempt of the mandate of this court, issued on the thirtieth day of November, 1872, and that, in disobedience of said mandate, he continues to restrain

the relators from practicing as lawyers in the court over which he presides, and that they are thus deprived of their legal rights as licensed attorneys of the courts of this State, and that he did so far disregard the rights of the relators, and their clients to be represented by them in the said courts presided over by the said Henry Maney, at the last term of the District Court of Guadalupe county, and since the thirtieth day of November, 1872, as to refuse to hear them as attorneys, or to allow them to represent their clients in causes then and there pending in said District Court; and the said information being proved to our satisfaction by the oaths of Wm. E. Goodrich and W. H. Burgess; it is therefore ordered, adjudged and decreed, that the said Henry Maney is guilty of a contempt of the mandate of this court, and that he pay a fine of five hundred dollars ($500), and be imprisoned in the county jail of Travis county for the term of fifteen days; and that in default of the payment of said fine, as well as a fine of one hundred dollars heretofore assessed against him on a similar complaint of contempt, of which he was found guilty by this court on the thirtieth day of November, 1872, on the expiration of his term of imprisonment, the sheriff of Travis county will return the body of the said Henry Maney before this court."

The circumstances under which the respondent was finally released, when brought before this court, are not disclosed by the record.

At the following term of the Guadalupe District Court the unfortunate contest was renewed by the refusal of Hon. Henry Maney to permit the relators to practice as attorneys until they had purged the alleged contempt. On the application, under oath, of Wm. M. Rust and John Ireland, process was again issued from this court, July 2, 1873, requiring Henry Maney to appear before it on the tenth day of July following, to show cause why

he should not be held in contempt of the orders of the court. It was served on the fifth of July.

On the seventh of July, Henry Maney, Judge of the Twenty-second Judicial District, relieved the contest from its increasing monotony by resorting to a novel expedient. He caused process to issue, under seal of the District Court of Guadalupe county, requiring the sheriff of Travis county to summon Wesley Ogden and M. B. Walker, judges of the Supreme Court, to appear before the District Court of Guadalupe county, at the court house in the town of Seguin, "on Saturday, the twelfth day of July, A. D. 1873, at 10 o'clock A. M., then and there to show cause, if any they can, why they should not be held in contempt of the District Court of Guadalupe county, for the issuance of the mandate (before set forth), and for unlawfully fining and imprisoning Henry Maney, Judge of the Twenty-second Judicial District."

On the tenth of July, Hon. Henry Maney failing to appear in obedience to process from the Supreme Court, an attachment was issued for his arrest, which was executed by Geo. B. Zimpelman, sheriff of Travis county.

On the twenty-eighth of July, a writ of *habeas corpus* was issued by Hon. L. D. Evans, as Chief Justice of this State,* directed to Geo. B. Zimpelman, for the body of Henry Maney, upon which the following return was made:

"Received same day issued. Not executed, being officially informed that Wesley Ogden is Presiding Judge of the Supreme Court of the State of Texas.

"GEO. B. ZIMPELMAN, Sheriff T. C."

It appearing to Hon. L. D. Evans, at chambers, that one "Wat. Campbell, a citizen of Austin," was a "suitable person to execute the writ of *habeas corpus*," issued

*At that time it was claimed by a majority of the Supreme Court that Judge Evans' term of office had expired.

by him, he was appointed, and on the ninth of August made return that he was unable to execute the same.

On this return being made, it appears from the papers on file that an order issued from the Hon. L. D. Evans, "at chambers," on August 11, 1873, requiring Zimpelman to appear before him to answer for contempt in failing to obey the writ of "*habeas corpus*."

On the same day the Hon. Henry Maney, through his counsel, being in close custody under attachment, applied to this court for time to answer the rule for contempt, alleging that he needed certified copies of fourteen judgments rendered in Guadalupe county, and for that cause desired the Supreme Court to postpone the hearing until the first Monday of September, 1873.

On the next day, Zimpelman failing to appear before the Hon. L. D. Evans "at chambers," the late Chief Justice signed and filed among the papers in the cause the following order:

"There being no return made to the rule on George B. Zimpelman, sheriff, and having no proper officer at my command to receive and execute a process against said Zimpelman, sheriff, this matter is adjourned *sine die*.

"L. D. EVANS, Ch. J. S. C."

On the thirteenth of August, 1873, Henry Maney applied to Justice Walker for a writ of *habeas corpus*, which was issued and returned forthwith by the production of the body of the relator before the court.

Proceedings were postponed until September 3, when the following opinion was pronounced:

PER CURIAM.—The court having had this case under consideration, and after due examination of the answer of the respondent, having heard the evidence adduced for and against the respondent, we are of opinion that the answer is wholly insufficient in law to purge the contempt

of which the respondent stands charged, if true; and we regret, after a full examination of the evidence, that we are forced to the opinion that the answer is evasive and seeks to avoid an answer to the charge against the respondent.

The statements contained in the answer are mainly contradicted by the evidence.

We have sought in vain for mitigating facts or circumstances upon which to reduce the punishment to be awarded in like cases, but have found none; and we are fully satisfied that the conduct of the respondent throughout has been in contumacy of the dignity of this court and in bold defiance of its authority. It is therefore ordered and adjudged, that the said Henry Maney be held in contempt of this court for willful disobedience of its process, issued on the second day of July, 1873, in the case of the State of Texas at the relation of John Ireland *et al.* against the said Henry Maney, Judge of the Twenty-second Judicial District, and that he, the said Henry Maney, be and hereby is sentenced to the county prison of Travis county, there to be kept and confined for the term of ten days; and he is hereby adjudged to pay a fine to the State of Texas of five dollars, and all the costs of this proceeding, for which, if not paid in ten days, execution may issue.

[The following note from Judge Maney was filed in the Supreme Court in the last cause decided, on the eighth of September, 1873.—REPORTERS.]

"*To the Honorable the Supreme Court of the State of Texas:*

"In the unfortunate controversy out of which has grown my present imprisonment, I have acted throughout from a sense of duty, and in the belief that my course was sanctioned by the law. I still so believe.

"But the Supreme Court—the highest tribunal in the State, and from which there is no appeal—having decided against me, I feel that a further contest on my part would be fruitless. Having done all that I conceive my duty requires in the premises, and being overruled by the Supreme Court, I yield to its superior power and authority. * * *

"HENRY MANEY."

Statement of the case.

C. W. EGERY ET AL. v. JAMES POWER.

1. This court rendered judgment March 7, 1855, in an action of trespass to try title, after the death of the original appellee who was plaintiff below, and the executrix of whose will was made appellee in his stead, but without making the heirs parties: *Held*, that this court had jurisdiction.
2. Though a plaintiff may become appellee in this court, he is here a defendant only as to the alleged errors of the lower court; and if he dies pending an appeal, his heirs are not necessary parties, but the case may proceed to judgment on making his executor a party.
3. *Quære:* Whether, on motion of parties representing themselves to be the heirs of one who died pending an appeal to this court, and who here ask to set aside a judgment of this court because they were not made parties, this court has jurisdiction to inquire *dehors* the record, and determine the question of heirship?

MOTION made in May, 1872, to set aside a judgment of this court rendered in March, 1855.

The judgment was rendered in an action of trespass to try title to land, brought in Refugio county by James Power, in 1849, against Cyrus W. Egery, Joseph F. Smith and Henry Smith. By change of venue the case was removed to Jackson county, where it was tried September 30, 1851, and judgment rendered for the plaintiff, Power, from which the defendants appealed.

Pending the appeal James Power, the appellee, died; his death was suggested, and his widow, Tomasa Power, as executrix, was made a party appellee in his stead, without making the heirs parties. The cause was decided at the Galveston Term of the Supreme Court, 1855. By this decision the title of Power was declared void, the judgment of the District Court was reversed, and the cause remanded for further proceedings.

The plaintiffs, at the death of their ancestor, were minors, and by the will of their ancestor the estate was to remain in the possession of the executrix until all of

his children became of lawful age, when it was to be distributed equally among them. On the youngest child attaining to the years of majority, the heirs prosecuted this motion to set aside the decision of the Supreme Court, and reinstate the case for trial.

C. A. Russell, Hancock & West, and *Moore & Shelley*, for the motion. — Superior courts have at all times the power to declare judgments void where the record itself shows that such judgments were rendered without authority, or that the courts had not jurisdiction of the parties, or of the subject matter. (Horan v. Wahrenberger, 9 Texas, 314; Elliott v. Piersol, 1 Pet., 328, 340; Voorhees v. Bank of United States, 10 Pet., 473; Williamson v. Berry, 8 Howard, 540; Moore v. Easely, 18 Ala., 619; *Ex parte* Crenshaw, 15 Pet., 123; Bank of United States v. Moss, 6 How., 31; Burr v. Lewis, 6 Texas, 76; also, 10 Yerg., 310; 9 Geo., 247; 12 Ill., 203; 15 Ala., 800; 20 Ohio, 344; Lytell v. Fenn, 3 McLean, 411; Ault v. Elliott, 2 Cranch, 372; Homans v. Coombs, Id., 681; Porter v. Marsteller, 1 Cranch., 129; Jackson v. Bank of United States, 5 Cranch, 1.)

Under the common law a bill of review could be brought at any time within twenty years, to revise a judgment for errors apparent upon the record.

This court will entertain motions to set aside judgments that are void for want of jurisdiction, or for other cause, and will hear affidavits and other proofs in support of such motions. (Hart v. Mills, 31 Texas, 313; Harris v. Hopson, 5 Texas, 529; Martel v. Hernshieme, 9 Texas, 294; Dial v. Rector, 12 Texas, 99; Chambers v. Hodges, 23 Texas, 110; Burr v. Lewis, 6 Texas, 76.)

The judgment rendered by this court in this case, on the seventh day of March, 1855, was void for want of jurisdiction. (23 Texas, 110, 455; 9 Ib., 313.)

Argument for the plaintiff in the motion.

"The jurisdiction of a court is the power given it by law to take cognizance of and try the case before it." (The State of Rhode Island v. The State of Massachusetts, 12 Pet., 717; United States v. Aredondo, 6 Pet., 709; 25 Texas, 136, Russell v. Mitchell; Comstock v. Crawford, 3 Wallace, 347; 7 Wallace, 694; Ib., 306; 6 Ib., 246; 5 Ib., 824; see, also, Flanagan v. Pierce, 27 Texas, 79; Andrews v. Beck, 23 Texas, 455; Cowan v. Mixon, 28 Texas, 230; Evans v. Pigg, 28 Texas, 586; Baker v. Chisholm, 3 Texas, 158; Thomas v. Jones, 10 Texas, 53; Withers v. Patterson, 27 Texas, 494; 28 Texas, 230.)

The law has given to the courts no power to decide upon the rights of parties, without such parties are before the court, and invoke its action. All parties whose interests are to be affected must be before the court. (Ottenhouse v. Burleson, 11 Texas, 87; Teas v. Robinson, Ib., 776; Mitchell v. De Witt, 20 Texas, —; Allison v. Shilling, 27 Texas, 450; 12 Texas, 99, before cited; see, also, Verden v. Colman, 1 Black's Rep., 472; Barbour on Parties, 293, 299; Broom on Parties, 108; Connelly v. Taylor, 2 Pet., 564.)

The plaintiff brought suit upon a title from the Mexican government, and obtained a verdict and judgment of the District Court establishing its validity. This judgment was sufficient assurance of title to vest the title in the plaintiff, without reference to the evidences upon which it was based. It constituted in itself a valid title to the land, until it was reversed or set aside. (Fisher v. Miller, 20 Texas, 572; Voorhees v. Bank of the United States, 10 Pet., 473; Elliott v. Piersol, and other cases before cited; 2 Smith's Leading Cases, 553.)

The judgment is not vacated by an appeal where the appeal is in the nature of a writ of error; and the appellate court does not try the case *de novo*, but revises the

case upon errors. (Powel on Appellate Procedure, 358, 371, 373.)

The plaintiff, James Power, died pending the appeal in this court, and, upon his death, the title which had been vested in him by the judgment of the District Court immediately vested in his heirs. (Paschal's Digest, Art. 1373, and cases cited; Walker on American Law, 352; Bufford v. Holliman, 10 Texas, 560; Ansley v. Baker, 14 Texas, 607.)

"The estate at the death of a party vests immediately in the heirs as the true and lawful owners." Fisk v. Norvel, 9 Texas, 16.) Upon the grant of letters testamentary or of administration, the estate passes from the heirs *sub modo* for the purposes of administration only. (Patton v. Gregory, 21 Texas, 518.)

The common law has been the rule of decision in this court since 1840, except so far as modified by statutory provisions. By the common law this suit would have abated at the death of a party. (Alexander v. Barfield, 6 Texas, 402; 2 Tidd Pr., 932; 3 Rob. Pr., 243, 288.)

This rule of the common law was modified by act of May 12, 1846, regulating proceedings in the Supreme Court. (Paschal's Digest, Art. 1573.) The provisions of this act are as follows, to-wit:

"When any person, plaintiff or defendant in any suit pending in the Supreme Court, shall die, it shall be lawful for the clerk, during the recess of the court, upon aplication by petition, to issue proper process to enable the court to proceed to final judgment in the name of the representative of such deceased person."

The question then arises, who is the "representative" of a deceased person? Is it the heir, or the executor or administrator?

In all matters affecting the title to real estate which had descended to the heir, the heir was the representative

of the deceased. (*Vide* Webster's Dictionary—"Representative: one who stands in the place of another as heir, or in the right of succeeding to an estate of inheritance, or a crown." Also, Burrill's Law Dictionary.) "The heirs, executors and administrators are compendiously styled the real and personal representatives of the deceased." (2 Stephens' Com., 243; 2 Black. Com., 503; 1 Will. Extrs., 1851; Wharton's Law Lex., Art. Executor and Heir; also, Bouvier's Law Dict., Art. Executor.)

The act of 1848, regulating proceedings in the probate courts (§ 135, Art. 1396, Paschal's Digest), provides, "that the rights, powers and duties of executors and administrators shall be governed by the principles of the common law where not otherwise provided."

Nothing is contained in this act to give to executors or administrators power to litigate the titles of the deceased to real estate. They had no such power under the common law, and none was bestowed upon them by this act.

The heirs were necessary parties, and ought to have been made so before any adjudication was made upon the title. (31 Texas, 347; Ottenhouse v. Burleson, 11 Texas, 87; Teas v. Robinson, Ib., 774; Thomas v. Jones, 10 Texas, 53; Blair v. Cisnero, 11, Texas, 41; Bouv. Law Dic., Abatement Pleading, ¶ 16; Barbour on Parties, 245, 320; 1 Dan. Ch. Prac., 185, 256, 260, 253; Douglass v. Massie, 16 Ohio, 271; Russell v. Clark, 7 Cranch, 69; 4 Mass., 354; 1 Ib., 35; 16 Ib., 280; 3 Ib., 268; 5 Ib., 240; 14 Ib., 500; 4 Ib., 598; 2 Ib., 478; 1 Pick., 157; 3 Cow., 299; Shep. Touch., 472; MacNamarra on Nullities, 4.)

From these authorities it follows that the judgment of the court rendered in the cause was void for want of jurisdiction of the parties in interest. (2 New Hamp., 191; 2 Smith's Leading Cases, 553, Fisher v. Herndon; Paine, 55; 25 Miss., 513; 2 McLane, 511; 11 Georgia, 453.)

This court has authority, under its general powers as a

superior court, to devise such modes, establish such rules and issue such process as may be found necessary to effect the objects of justice in a case brought properly before it. (Tucker v. Anderson, 25 Texas Sup., 155; Pas. Dig., Art. 1578; Pas. Dig., note 182, page 57; Evans v. Pigg, 28 Texas, 586; 11 Texas, 776; *Boni Judicis est Amplaire* — Broom's Legal Maxims; Barry v. Randolph, 3 Binn., 277; Vanatta v. Anderson, 3 Binn., 417, S. P.; 10 Yerg., 310; 9 Geo., 247; 12 Ill., 203; 20 Ohio, 345; 15 Ala., 800; 18 Ala., 619.)

No brief for defendants in motion has reached the hands of the Reporters.

OGDEN, J.—This is a motion to set aside a judgment and decree of this court rendered in March, 1855, for the want of jurisdiction in this court of the parties in interest in the subject matter in litigation in said suit.

The judgment sought to be vacated by this motion originated in an action of trespass to try title to certain lands, brought by James Power against the defendants to this motion in Refugio county in 1849, which, by change of venue, was removed to Jackson county, where the plaintiff, Power, obtained a judgment in 1851, and the defendants below appealed to this court. Pending the appeal James Power died, and his widow and executrix was made a party appellee as his representative, and the cause was decided by this court in 1855, reversing the judgment of the District Court, and remanding the cause for further proceedings. It appears that no further action has been had in the matter by the District Court, and the heirs of James Power now present this motion to set aside that judgment on account of its nullity, for the reason that on the death of James Power they, and not the executrix, were not made parties to the suit. They claim that they, on the death of James Power, were the only

legal parties to represent the appellee, and that, as they were minors, and were not made parties, the cause was decided without parties, and therefore without jurisdiction in the court, and that the judgment in consequence is null and void.

It may be stated as a well settled principle of law, that where a judgment is clearly void for the want of jurisdiction, time, however long protracted, can in nowise affect or change its nullity; but it is also well settled, that after a long lapse of time every reasonable and fair presumption will be indulged in to sustain the regularity, legality and jurisdiction of the courts; and at least no judgment will be declared void until it be made clearly to appear from the law, or the facts of a case, that it is a nullity.

It is also a well recognized principle of law and equity, that where a particular construction has for a long time been placed upon a statute by the courts of the country, and has been recognized by the whole community as a true and correct interpretation, where questions of the rights and interests of parties have long since arisen and been settled, it is not the true policy of wisdom or justice to change that construction, and thereby unsettle the affairs of society, and disturb adjudicated rights, unless demanded by very solemn and weighty considerations. Where the courts have, upon mature adjudication, taken cognizance of a matter, and assumed jurisdiction of a person, or cause, that adjudication should not be set aside, except upon the most urgent demand of law and justice.

Let us, then, look to the law and decisions touching the question raised by the motion in this case, and see if this court was clearly without jurisdiction of the subject matter, or the parties at interest, when the decision complained of was made. The cause was regularly appealed from the District Court during the lifetime of Power, and

it is not questioned that up to the time of his death this court had complete jurisdiction of the whole case; but at his death the widow and executrix, and not the minor heirs, was made a party. Article 1447, Paschal's Digest, provides, that "Suits for title, or for the possession of lands, or for any right attached to, or growing out of the same, or for any injury or damage done thereto, may be instituted by executors, administrators, or guardians, in like manner as they could have been by their testator or intestate, and judgment in such cases shall be as conclusive as if rendered in favor of their testator or intestate." This statute is without ambiguity, and we are not aware that but one construction has ever been contended for it. It is very clear that if Power had died before the institution of this suit, the executrix would, under this statute, have had full authority to institute this suit, and to prosecute the same to final judgment, whether an appeal had been taken to this court or not. (Lacy v. Williams, 8 Texas, 182; Givens v. Davenport, 8 Texas, 451; Thomas *et al.* v. Jones, 10 Texas, 52; Patton v. Jones, 21 Texas, 513; J. R. Bartlett v. R. T. Bartlett, 31 Texas, 344.)

But it is contended that there is no law authorizing suits to be brought against executors or administrators, where the title to land is brought in question; and that this suit was decided in favor of Power in the lower court, and appealed by the opposite party; and that, therefore, while in the appellate court, the suit was against Power, and the appeal could not be prosecuted against his executrix. We do not so understand the law in relation to the relative position of the parties litigant. The plaintiff below may assume the relative position of defendant in this court, but he is defendant only in relation to alleged errors of the lower court, while he is as much the plaintiff in regard to the original subject matter of the suit in this as in the lower court; and it cannot properly be said that

because a party appeals a cause in which a judgment has been rendered in favor of an administrator or executor, that he thereby brings suit against the administrator or executor.

But it would seem that the latter clause of Article 1373, Paschal's Digest, was intended to settle that question, for it provides that the executor or administrator shall have a right to the possession of the estate he represents, and that it shall be his duty to recover and hold possession of the same in trust.

This court has frequently had the question raised by this motion under consideration, and it is believed it has uniformly recognized the right of the executor or administrator to be made party in a suit, when the testator or intestate had died *pendente lite*, whether in the District or Supreme Court. (Givens v. Davenport, 8 Texas, 465; Thomas v. Jones, 10 Texas, 52; and in the case at bar, Egery *et al.* v. Power.) The opinion of the court in this cause was delivered by Hemphill, C. J., and has, ever since, been regarded as one of the leading authorities in regard to colonial grants made by the government of Coahuila and Texas, and the right to appropriate, under those grants, land within the littoral leagues. It appears that the court, then, had no doubt of its jurisdiction over the case, and that the right parties were before the court.

That an executor or administrator may prosecute a suit for title or possession of land belonging to the estate he represents, has been too often decided by this court to require at this time reference to cases. The cases referred to by the plaintiff to this motion (found in 10 Texas, 52, and 31 Texas, 344) fully recognize the law as here enunciated. We are clearly of the opinion that when this case was decided the court had complete jurisdiction, not only of the subject matter, but also of the parties interested.

There is another question raised by the defendant

in this motion, which might have great weight in the proper disposition of this case, if other considerations had not already disposed of the motion. Parties representing themselves to be the heirs of James Power, deceased, have filed this motion; but it may be questioned whether this court, having only appellate jurisdiction, has any power or authority to inquire into or determine the question of heirship as an original matter.

For the reasons here given the motion is overruled.

MOTION OVERRULED.

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LEWIS HART v. THE STATE OF TEXAS.

1. Defendant was indicted for an assault upon one Persons; *held*, the omission to add the final letter to the name of Persons not such a change in the name as would vitiate the indictment.
2. A verdict of guilty of assault with "attempt to murder," on an indictment for assault with intent to murder, is sufficiently definite to render judgment upon.

APPEAL from Caldwell. Tried below before the Hon. Henry Maney.

The facts appear in the opinion.

Nix & Story, and *James H. Burts*, for appellant.

Attorney-General, for the State.

OGDEN, J.—The appellant in this case was indicted for an assault upon one Rolan Persons, with "intent to kill and murder the said Rolan Person." We think the omission to add the final letter to the name of Persons in the closing part of the indictment not such a change in the name as would vitiate the indictment; particularly as the name was frequently used and correctly spelled in

the former part of the indictment, and then, finally, the party assaulted was referred to as "the said Rolan Person." There can be no doubt, from the language of the indictment, that the person charged to have been assaulted is identical with the one the defendant is accused of intending to murder, and the clerical omission of the final letter in this case in nowise decreases the certainty of the indictment.

Neither is the objection to the verdict of the jury well taken. It can hardly be expected that the verdict of juries will always be in precise conformity with the letter of the law, nor in the technical language of the books; and therefore, if the verdict of a jury is entirely responsive to the charge in the indictment and the law, and is clear and intelligible, it is sufficient, though a different word may have been substituted in the verdict for one in the charge or the law, provided that substituted word conveys the same meaning as the one for which it is used. In the case at bar the jury found the defendant guilty of an assault with "attempt to murder." The word "attempt," in this connection, conveys the same idea as "intent;" and, as counsel suggets, it signifies something more, for it not only implies a purpose and action of the mind, but it also signifies an action of the body to put in execution the intent or purpose of the mind. We think the verdict sufficiently definite and clear, and a response to the law and the charge.

There is an error in the fourth clause of the charge of the court to the jury, wherein they are instructed that "if defendant shot Persons and did not intend to murder him, then he is guilty of an aggravated assault or battery;" thus entirely precluding from the consideration of the jury the right of self-defense, or the innocency of an unavoidable accident, and to that extent it might be considered as charging upon the weight of evidence; but as

there was no evidence to raise a presumption of self-defense or accident, that error could not affect injuriously the rights of appellant, and therefore will not require a reversal of the case on that account.

The facts as proven did not require that the jury should be particularly instructed in regard to manslaughter, as under our law and the evidence of the case the appellant could not have been convicted of manslaughter, or of an assault with intent to commit manslaughter. Judging from the evidence, we fully agree with his honor the judge who tried the case, that the appellant is guilty of an assault with intent to murder, or of an aggravated assault and battery; and the jury have said he is guilty of an assault with intent to murder, and we are not inclined to disturb their verdict. The judgment is therefore affirmed.

AFFIRMED.

SARAH SCOTT, ADMINISTRATRIX, v. D. D. ATCHISON.

1. An agreement made by an attorney of B. (an executrix) with C., by which the attorney surrendered to C. a note due the estate, given by D., secured by deed of trust on land, in consideration of C.'s note then given to pay the amount mentioned in the note surrendered "twenty-four months after the ratification of a treaty of peace between the United States and the Confederate States, payable in whatever may then be the legal currency of the Confederate States," also secured by deed of trust on the same land, does not discharge the first note, which still remains a valid incumbrance on the land.
2. Only those to whom a valid payment may be made can make a novation of a debt.
3. An executor cannot change the character of the trust fund held by him without the order of a court having chancery jurisdiction; without such order he cannot make a novation of an old debt for a new one.
4. An attorney has no power to change the securities of his client unless he be the attorney in fact specially authorized so to do.

5. Payments made to an executor in Confederate money do not extinguish the debt.
6. A binding legal contract cannot be discharged by the promise to do, or the actual performance of an illegal act.

APPEAL from Grimes. Tried below before the Hon. James R. Burnett.

Suit brought September, 1865, by D. B. Morrill, as holder and owner of a promissory note on James B. Pye for $1750, against appellee, alleging that it was given to secure so much of the purchase money for a certain tract of land described, which Pye had bought of Noble, and on which a vendor's lien was retained to secure its payment.

Atchison and Manwaring and wife were made defendants, alleging that Atchison bought of Pye and Manwaring and wife of Atchison, all with notice of the vendor's lien.

In April, 1866, the appellant intervened.

There was evidence that in 1857 she loaned Noble $3000 to purchase the land; that he bought it with this money and gave her his note, with trust deed on the land, to secure its payment.

In March, 1860, Noble sold to defendant Pye, and in December, 1860, appellant, at Noble's request, took Pye's note for $2250, with ten per cent. interest from December 22, 1860, and due on the ninth of February, 1861, with trust deed on the land from Pye to secure its payment.

On the fifteenth of March, 1861, this note was renewed by Pye, adding the interest past due, and making a new note to appellant for $2475, due ninth of February, 1862, and executing a new trust deed on the same land to secure its payment, which was recorded. On the twentieth of March, 1862, Pye sold and conveyed to Atchison, and as part of the consideration it was recited in the deed that Atchison would pay this last note of Pye to appellant.

Statement of the case.

On the ninteenth of June, 1862, Atchison gave to the attorney of appellant, in lieu of Pye's note, his written promise of that date, payable to her, for $2879.25, "twenty-four months after the ratification of a treaty of peace between the United States and the Confederate States, payable in whatever may then be the legal tender currency of the Confederate States, with eight per cent. interest from date," and executed to her a trust deed on the same land to secure the payment of that obligation, which was likewise recorded. These her attorney took without any new consideration.

Pye's note was delivered up and her trustee released the trust deed. Afterwards Atchison sold to Manwaring and wife, for Confederate money, and in his deed to Mrs. Manwaring covenanted to remove the then existing incumbrances on the land, including appellant's.

No part of Pye's note or Atchison's undertaking has been paid in money of any kind.

Appellant alleged that Pye was insolvent, and no recovery could be had on Atchison, because of his undertaking being uncertain, and her only security was in the enforcement of her trust. She offered to deliver up Atchison's undertaking and trust deed to be canceled, and asked to be reinstated in all of her rights upon Pye's note and trust deed; that Atchison and Manwaring and wife be compelled to deliver up Pye's note and trust deed, to be enforced in her favor; for judgment against Pye for the amount of his note and interest and foreclosure of the trust deed, and for priority of lien as to the plaintiff Morrill. But, if not thus entitled, and it should appear that Atchison's undertaking was given in place of Pye's note, and intended by him at the time to create a legal obligation on him for its payment, then she asked that it be taken as his recognition and acknowledgment of that amount then due on Pye's note, for which

the land was chargeable, and the execution and delivery of the trust deed by him be held as his declaration and continuance of her express trust upon the land to secure the payment of Pye's note, and for judgment against him for the same and foreclosure of the trust.

And if not so entitled, she prayed for judgment against Atchison on his promise and assumpsit in Pye's deed to pay Pye's note; and because Manwaring and wife purchased with notice of Atchison's trust deed, that she be held to have a lien on the land to secure the payment of the judgment against Atchison, and for foreclosure of it.

At the trial term from which this appeal was prosecuted appellant amended, averring that the money lent to Noble was assets of the estate of James Scott, her late husband, of whose estate she was then and yet remained administratrix.

The appellee demurred to appellant's evidence. The appellants refused to join in the demurrer, upon the grounds that the evidence conduced to prove the material allegations in her petition, and because, under the Constitution, she had the right of the trial of her cause before a jury. The court below compelled a joinder in demurrer, sustained the demurrer to the evidence, and gave judgment for the defendants, from which this appeal is prosecuted.

Baker & Maxey and *John C. Easton*, for appellant.

C. Caldwell and *D. D. Atchison*, for appellees, cited Thompson, Admr., v. Forbes J. Henson, 31 Texas, 610; Ritchie v. Street, 32 Texas, 335; Vander Haven v. Nette, 32 Texas, 183; Christy v. Hughes, 26 Texas, 235.

WALKER, J.—On page 3 of the appellee's brief we find such a statement of this case as we believe the appellant cannot object to; and as we think the single point neces-

sary for our consideration is therein presented, we adopt the statement, from which we will endeavor to deduce our opinion. It is as follows:

"The whole subject matter now presented in this case is simply this point. In May, A. D. 1862, Confederate money was the currency in circulation. Atchison purchased the tract of land in controversy from James B. Pye for about $6000, and paid therefor this money, reserving a balance in his hands with which to take up and discharge a note of Pye to Noble, and a note from Pye to Mrs. Sarah Scott, the payment of each of which was secured by a lien on the land. Wm. Niblett, Esq., the son-in-law and attorney at law, whose name is signed to intervenor's (Scott's) petition, agreed to discharge the Pye note in consideration of Atchison's note, executed to Mrs. Scott, 'payable two years after a treaty of peace between the Confederate States and the United States, the payment to be secured by deed of trust.' And it was accordingly done; and in this way Pye's note was taken up, and it is claimed was thus paid and discharged, and the trustee released the title vested in him to Atchison."

We must add to this statement of the case, that the appellant, Mrs. Scott, is the administratrix of her husband's estate, and that the money sued for belongs to the estate.

The question then arises, is the obligation of Pye and the lien which he gave upon the land in question discharged? It is not disputed but that Pye was indebted to Mrs. Scott on the fifteenth day of March, 1861, in the sum of $2475. This was a valid debt secured upon the land, on the twentieth of March, 1862, when Pye sold the land to Atchison, and as a part of the consideration Atchison assumed to pay the same, under the following clause in his deed from Pye:

"And for further consideration the said Daniel D. Atchison does hereby assume the payment of a certain

promissory note for the sum of two thousand four hundred and seventy-five dollars, with interest thereon at the rate of twelve per cent. per annum from the ninth day of February, A. D. 1861, due the ninth day of February, 1862, and executed by James B. Pye on the fifteenth day of March, 1862, to Sarah Scott, of Grimes county, and secured by deed of trust on the tract of land herein conveyed to said Atchison," etc.

At page 217, 1 Parsons on Contracts, the author informs us that the term *novation* is derived from the civil law, where it forms an important topic. The term delegation also belongs to the civil law, and herein we find the true definition of the transaction between these parties. In Pothier on Contracts, Vol. 1, top page 444, we find this language:

"*Delegare est vice sua alium reum dare creditori, vel cui jusserit!*"

Delegation is a kind of novation by which the original debtor, in order to be liberated from his creditor, gives him a third person, who becomes obliged in his stead to the creditor or to the person appointed by him. It results from this definition, that a delegation is made by the concurrence of three parties, and that there may be a fourth.

There must be a concurrence:

1. Of the party delegating; that is, the ancient debtor, who procures another debtor in his stead.

2. Of the party delegated, who enters into an obligation in the stead of the ancient debtor, either to the creditor or some other person appointed by him.

3. Of the creditor, who, in consequence of the obligation contracted by the party delegated, discharges the party delegating.

Sometimes there intervenes a fourth party, viz., the person indicated by the creditor, and in whose favor the

person delegated becomes obliged, upon the indication of the creditor, and by the order of the person delegating.

"To produce a delegation the intention of the creditor to discharge the first debtor, and to accept of the second in his stead, must be perfectly evident; therefore if *Peter*, one of the heirs of my debtor, in order to liberate himself from an annuity to me, has, upon a partition of the succession, charged his co-heir *James* with the payment of it, *Peter* will not be liberated, unless I formally declare my intention that he shall be so; and though I receive the annual payments from *James* for a considerable time, it must not be concluded that I have taken him as my sole debtor in the place of *Peter*, and discharged *Peter*."

There must be no illegality or fraud; the transaction must be free from covin and misrepresentation, *duress per minas*. For, says Pothier, pages 554 and 557:

"There must be no obligations which the law reprobates and annuls, for these cannot produce any effect." (*Vide supra.*, p. 2, ch. 2.)

"The consent which the creditor gives to the novation of the debt being equivalent, so far as regards the extinction of the debt, to a payment of it, it follows that only those to whom a valid payment may be made can make a novation of the debt."

And for this reason those persons who were under legal inability, minors, married women, etc., cannot make a novation; and apply to this the principle of the common law, that guardians, trustees, administrators and executors cannot change the character of the trust funds held by them without an order from a court of chancery jurisdiction, they, too, it would seem, should not be allowed to make a novation of an old debt for a new one.

Nor will courts apply the doctrine of presumption to make out a novation or delegation which does not clearly

appear; and, says Pothier, the reason of this law is, that a person shall not easily be presumed to abandon the rights which belong to him. And as a novation implies an abandonment by the creditor of the first claim, to which the second is substituted, it is not to be easily presumed, and the parties ought expressly to state it.

We will not deny but that the acts of parties might be such that the courts would hold that the novation had been consummated; but, says Pothier, "Unless the intention evidently appears, a novation is not to be presumed; therefore if I attach the goods of *Peter* in the hands of *James*, and *James* merely undertakes to pay the money due from me to *Peter* without any expression on my part of taking the security for the sake of *Peter*, or some other intimation which renders it evident that I intend that *Peter* shall be discharged, it will not be considered as a novation, but *James* will only be deemed to have acceded to the obligation of *Peter*, who continues bound as my debtor. This was adjudged by an *arret* of the Parliament of Toulouse, reported by Catelan." (Vol. 2, l. 5, ch. 38.)

Upon this principle, says Mr. Evans (the English editor of Pothier), it was held by the Court of King's Bench in White v. Cuyler, 6 T. R., 176, that the undertaking of a surety by deed did not extinguish the obligation of the principal debtor. And in the case of Hamilton v. Cullenden, 1 Dallas, 420, it appeared that Cullenden gave the plaintiff a mortgage and bond; that Cullenden's executors afterwards sold the equity of redemption to Bird, who gave his bond to the plaintiff for the amount of the principal and interest then due, which was ruled to be no discharge of the preceding bond. The discussion, as is usual in American courts, turned principally upon the authorities of the English law. This last remark of the editor may be very satisfying to English legal pride; but

if this were ever true, we incline to think that the rule has changed.

Let us, so far as these principles are applicable, apply them to this case. There was doubtless a concurrence between Pye and Atchison, the delegant and the delegate. But was there any contemporaneous concurrence of Mrs. Scott, the creditor, in this arrangement? Has there ever been such a concurrence? Apply the maxim, "*consensu animo.*"

This kind of contract, like all others, to be binding must be consensual. It was not until the nineteenth of June, 1862, that Atchison entered into the arrangement with Niblett, the appellant's attorney, under which he claims to have extinguished Pye's debt to Mrs. Scott. And how was this accomplished, *if at all?*

This court has decided at the present term that an attorney has no power to change the securities of his client, unless he be the attorney in fact specially authorized so to do under a power; and that payments made to attorneys, administrators, executors and guardians, in Confederate money, do not extinguish the debt, we have more than once decided, when made in Confederate money.

If, then, the payment had been made in Confederate money to Niblett, it would not have extinguished the debt; no more would it when made to Mrs. Scott herself, if the debt were a part of the assets of her husband's estate.

But let us look at the nature of Atchison's undertaking. It seems to have been an agreement to pay $2879.25 "twenty-four months after the ratification of a treaty of peace between the United States and the Confederate States, payable in whatever may then be the legal tender currency of the Confederate States, with eight per cent. interest from date."

It appears to be conceded that this contract is void for

uncertainty. We are by no means sure that we should adopt this opinion were it necessary to give it such equitable construction as the rights of parties in a given case might demand; and we say that this obligation was not discharged by payment in Confederate money to Mrs. Scott, as the administratrix of her husband's estate.

There has been a "treaty of peace," and the Confederate States and all the other States of the United States of America have a "legal tender currency," and we think it by no means a foregone conclusion that this contract is void for uncertainty.

But it is perhaps unnecessary to discuss this question further. Mr. Parsons, in elucidating the subject of novation (Vol. 1, p. 219), says: "And the general principles in relation to consideration attaches to the whole transaction; thus to give to the transaction its full legal efficacy, the original liabilities must be extinguished. For if the debt from A. to B. be not discharged by A.'s promise to pay it to C., then there is no consideration for this promise, and no action can be maintained upon it; but if this liability be discharged, then it is a sufficient consideration."

Was Pye's liability, then, to Mrs. Scott, which was valid and binding—in other words, a legal contract based upon a good consideration—discharged by Atchison's promise, which we are at one time told is void for uncertainty? And again, we are told that the real sum and substance of this promise was to pay the debt in Confederate money, which was accordingly done. Can a binding legal contract be discharged in this way, by the promise to do or the actual performance of an illegal transaction? We think not; but if we had any doubts of the correctness of our opinion, that doubt would be set at rest by the former decisions of this court. In the case of Elsberg v.

Bonds, 31 Texas, 612, Mr. Justice Caldwell, delivering the opinion of the court, says:

"It has been repeatedly ruled by this court that Confederate money, so-called, cannot be considered a payment. True it has in like manner been held that an executed contract will not be disturbed when Confederate money was the consideration. (Ransom v. Alexander, 31 Texas, 443.) In the case of an administrator receiving a debt due his intestate's estate in Confederate money and surrendering the evidence of debt, it cannot be viewed in the light of an executed contract. The debt still remains due, and may be collected by process of law, because the debtor is bound to know that an absolute payment in lawful money can only discharge a debt sounding in dollars, payable to any one acting in a fiduciary capacity."

We adopt the doctrine of this case and that of all other similar cases heretofore adjudicated by this court and the courts of other States; and the doctrine is maintained in all the insurgent States, except alone the State of North Carolina.

The learned judge says in the opinion just quoted all that we need say on this branch of our case, and must not gainsay as attorney what he has said as judge.

We are not opening up an executed contract where Confederate money has passed, but we propose to enforce a good contract which has not been executed. A contract in no respect illegal was that of Pye with Mrs. Scott, and no illegal contract must come in the way of its execution.

What, then, is the present status of the parties? We hold that Pye's obligation to Mrs. Scott has never been discharged, and that it is a valid incumbrance upon the land that Atchison bound himself to Pye to pay off; that the debt is still an incumbrance upon the land, and that subsequent purchasers of the land with notice cannot

take it discharged of the incumbrance, and Pye's deed to Atchison is notice to all who claim under or through it.

The pleadings are defective and will require amendment. We might, under the authority of Howard *et al.* v. Blythe (32 Texas, 800), proceed to render a judgment in accordance with this opinion, but we deem it better to reverse and remand the case, that parties may have an opportunity of amending their pleadings and presenting the cause to the District Court in accordance with the law herein laid down, which is accordingly done.

REVERSED AND REMANDED.

Upon rehearing, granted on the application of appellant, the following opinion was delivered:

WALKER, J.—We are unable clearly to discover the object and purpose of the rehearing in this cause. We granted it readily that we might have an argument of the abstruse and difficult question of law which we conceive to be involved in the case; but now, on reading the arguments *pro* and *con* on the motion, we have little else than a dispute about a question of fact, which we are charged with assuming, without authority from the record; and yet counsel admit that the fund sued for did at one time belong to the trust estate in the hands of Mrs. Scott, and on page 161 of the transcript the deed from Noble to Patrick recites this fact, and this in itself, aside from a total want of evidence to show that the character of the fund has ever been changed. And counsel also assert, in the argument upon the motion, in the following language: "Indeed appellants have changed the style of the cause from D. B. Morrill v. J. B. Pye to that of Scott, Administratrix, v. Atchison *et al.* This was evidently done for the purpose of misleading the appellate court," etc. This was very wrong. Counsel should not have suffered

a new case to be thus imposed upon them, and have this court misled by it. If there was anything wrong in the style of the suit it should have been corrected in the District Court, before the case came here.

But it is admitted all around that our opinion is sound law. We remanded the cause and suggested amendments in the pleadings. Now if our opinion be sound law, and yet the facts do not make out a cause to which it is applicable at all, we are quite sure it can do no harm. But inasmuch as it is supposed to be good law, we will adhere to it, and the judgment of the court will be as therein indicated.

ORDERED ACCORDINGLY.

FINCHER JONES ET ALS v. WM. BURGET ET ALS.

It is error in a judgment for plaintiff, in a suit of trespass to try title, to award a writ of possession against persons other than defendants, who have entered upon the premises recovered, prior to the institution of the suit.

APPEAL from Kaufman. Tried below before the Hon. John H. Reagan.

The facts sufficiently appear in the opinion.

Word, Jackson & Word, for appellants.

John C. Robertson, for appellees.

WALKER, J.—This case has been in litigation since the twenty-third of October, 1856. It might here be terminated but for one error, which may indeed be an error of the clerk in copying the record, or it may have been an error of the court in entering the decree. On page 146 of the record this language occurs in the decree:

"It is further ordered by the court, that a writ of possession issue from this court, to turn said defendants out

of possession of said land, and all other persons who have entered said land since the twenty-third day of October, 1846, and place the said plaintiffs in possession."

This decree, as it comes to us, is erroneous. The suit was commenced on the twenty-third of October, 1856, and would only be notice to such persons as settled on the land *pendente lite.*

There may have been persons in possession who settled upon the land prior to the commencement of the suit, who could not be thus summarily dispossessed. They would be entitled to their day in court.

It is true no such persons are heard complaining in this court, and should there be any persons thus wrongfully affected they may not have had the opportunity to be heard here. The counsel for appellants insist upon this error in their brief, and perhaps the error assigned as the fifth in order would cover this defect in the decree and raise the question for the consideration of this court.

We find nothing in the other assignments for error upon which we think this judgment should be reversed; but for the reasons assigned the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

T. P. YARBORO ET AL. v. ELIZABETH BREWSTER.

In the administration of an estate the probate court has jurisdiction to ascertain *what is* the homestead; yet the court has no jurisdiction to order the sale of the homestead, nor would a purchaser at such sale take any right as against the minor children.

APPEAL from Fannin. Tried below before the Hon. W. H. Andrews.

The opinion of the court presents the facts.

Argument for the appellants.

S. B. Maxey, for appellants.—The claimants are non-residents. (30 Texas, 636, Huffman v. Neuhaus; 31 Texas, 688, Welch v. Rice.)

The jurisdiction of probate courts over estates of decedents is unquestioned.

In Lynch v. Baxter, 4 Texas, Mr. Justice Lipscomb, speaking for the court, says, on page 445, that the probate court has jurisdiction over the estates of deceased persons cannot be doubted; that this jurisdiction was brought into exercise directly upon the property by the petitioner praying the decree for an order of sale of the land, is equally clear. The land was the subject matter on which the court exercised its jurisdiction; whatever might be the order, it was a question before a competent court, and its decision was subject to review by appeal, but could not be attacked in a collateral way. That it was a proceeding *in rem* can be made manifest by supposing that the heirs of the intestate had sued Lynch, the purchaser, and attempted to show that this jugdment or decree for the sale of the land was void, because they had no notice and were not parties to the proceedings of the probate court. The answer would be that it was not necessary to make them parties, because the proceedings were *in rem*, acting on the land directly, and that the decree of the court could not be collaterally attacked; * * and the purchaser, having purchased without fraud or collusion with the administrator, would be protected by the sale, if the decree under which it was made was the decree of a court of competent jurisdiction.

This would come clearly within the rule laid down in Wyman *et al.* v. Campbell *et al.*, and the purchaser would not be affected by any irregularity in the proceedings or error in the judgment of the court in making that decree; all the vigilance the law would exact from him would be to see that the court making the decree had

competent jurisdiction, and he could not be called upon to inquire whether the evidence before the judge of the necessity of the sale had been spread on the record or not. (To the same effect see 1 Starkie on Evidence, pp. 217, 241.)

In the same opinion the court says: "I have been so forcibly struck with the practical good sense of the remarks of the Supreme Court of Ohio on this subject that I trust I shall be pardoned for introducing them here. In the case of the Lessee of Goforth v. Longworth (4 Ohio R., 129), the court says: 'It is held to be well settled that courts give a liberal construction to statutes authorizing sales of real estate by executors and administrators. Public policy requires that all reasonable presumptions should be made in support of such sales, especially respecting matters *in pais*. The number of titles thus derived, and the too frequent inaccuracy of clerks and others concerned in effecting these sales, render this necessary. If a different rule prevailed purchasers would be timid, and estates consequently be sold at diminished value, to the prejudice of heirs and creditors.' "

I have transcribed largely from Lynch v. Baxter, because it breathes the philosophy of the law on the matter in hand, and I believe exactly pertinent to this case. The estate of Grimes being in process of administration in the Probate Court of Fannin county, its jurisdiction was brought directly in exercise upon this land by the petition for its sale. It was a proceeding *in rem*, acting directly on the land, and the decree ordering its sale and confirming the same cannot be collaterally attacked. The purchasers were not bound to know more than that the Probate Court of Fannin county had jurisdiction of the estate of James Grimes; that it had rendered a decree ordering the sale of the land; and they could not be called on to know that the evidence on which the decree

was rendered was sufficient. If this was a homestead, or plaintiffs were entitled, the proof would have been by matters *in pais*, and all law justifies the purchasers in concluding that all facts necessary to uphold the decree existed.

In Grignon's Lessee v. Astor, the Supreme Court of the United States held that where a County Court had jurisdiction to order a sale of a decedent's estate, on the representation and finding of certain facts, and the record showed that a petition was presented and the order made, that the granting of the license was a binding adjudication; that all facts necessary to give jurisdiction as well as to warrant the license existed, and that the record was conclusive evidence thereof. (2 Howard, 319.) In the same case the court says: "Titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral actions, or none can know what is his own; and there are no judicial sales around which greater sanctity ought to be placed than those made of the estates of decedents by order of those courts to whom the laws of the States confide full jurisdiction over the subjects." This is quoted approvingly in Poor v. Boyce, 12 Texas, 451. In this case, on page 449, the court says: "The petition of the administratrix gave the court jurisdiction. (Finch v. Edmundson, 9 Texas, 504.) All other questions, in the absence of fraud, are concluded by the judgment." Now if the jurisdiction was acquired by the petition, then in this case it was acquired, because the petition for sale was filed; and if all other questions, in the absence of fraud, are concluded by the judgment, then the questions raised by plaintiffs are concluded, for there was no fraud.

In Burdett v. Silsbee (15 Texas, 617), Mr. Justice Wheeler, speaking for the court, quotes with great approbation McPherson v. Cauliff (11 Serg. & Rawle, 422),

as follows: "If such a purchaser" (a purchaser at a sale by order of the Orphan's Court) "is not protected," they say, "then, as was said by the Lord Keeper in Windham v. Windham (3 Ch. Rep., 12), where a like attack was made on a sale under a decree of a court of chancery, you 'blow up with gunpowder the whole jurisdiction;' and here, if protection be denied to honest purchasers, you lay a train of gunpowder throughout the whole State, and this decision would be a signal to set fire to it; for nothing has been more irregular than the practice of these courts generally; there may be exceptions, but they are very rare." This case of McPherson v. Cauliff was referred to approvingly by the Supreme Court of the United States in Thompson v. Tolmie, 2 Pet., 157, *et seq.* In this last case the court says: "If the purchaser was responsible for the mistakes of the court, in point of fact, after they had adjudicated upon the facts and acted upon them, these sales would be snares to honest men. The purchaser is not bound to look further back than the order of the court." (15 Texas, 618.) Now the court had jurisdiction, and therefore had a right to pass upon the facts, and although it may have committed a mistake as to the facts, yet the purchaser was not bound to look beyond the decree. In Elliott v. Piersol (1 Pet., 340), the court says: "When a court has jurisdiction it has a right to decide every question that occurs in the case, and whether its decision be correct or not, its judgment, until reversed, is regarded as binding in every other court." This is quoted with approbation by our Supreme Court in Burdett v. Silsbee (15 Texas, 518, 619), and the court adds: "This is declared to be the clear and well settled law, as applied to the decisions of county and other courts having cognizance of the settlement of estates;" and our court, in the same opinion, says these principles are "salutary and firmly established, on which

depend not only the certainty of the enjoyment of rights secured by the sacred guaranty of the Constitution, but the preservation of social order." If these principles are salutary and firmly established, then appellants will be left in the undisturbed enjoyment of their honestly acquired property. In Alexander v. Maverick (18 Texas, 194), this court quotes with approbation Tucker v. Harris (13 Geo., 1). That case decides that Courts of Ordinary (constituted as are our Probate Courts), are "courts of general jurisdiction over testate and intestate estates; that their judgments relative to that subject matter stand upon the same footing as the judgments of any other court of general jurisdiction." "The jurisdiction being established," the court says, "all presumption must be made in favor of what does not appear. The court having the right to decide upon the application, the purchaser is not bound to go behind the judgment of the court."

Now this decision reduces the case in hand to a nutshell.

Did the Probate Court of Fannin county have a right to decide upon the application of the administrator of Grimes? Did it exercise that right? If these questions are answered affirmatively, as they are bound to be, then the purchasers are not bound to go behind the judgment of the court, and the appellants will not be molested. In the case above cited of Tucker v. Harris, Judge Lumpkin, who delivered the opinion, cites Kennedy v. Nach Smith, in which the court says: "Beyond the decree the purchaser is not bound to look. The inquiries upon ejectment are: Was there an administrator and order to sell, such as would authorize the administrator to make sale? Was the sale fair? If so, the settled rule is *de fide et officio judicis non recipitur quæstio.* And it is asserted that no sale in that State ever has been declared void in ejectment, against a purchaser *bona fide*, for any alleged irregularity in the Orphan's Court, or because the

decree of the court was founded on mistake." This court further shows that where a party dies intestate, the Orphan's Court has power over his estate, "and any one acting on the faith of their judicial acts will be protected." (Alexander v. Maverick, 18 Texas, 196.) The principle that the purchaser is not bound to look beyond the decree of the court is reiterated in George v. Watson (19 Texas, page 370).

Recurring to the Georgia case quoted in Alexander v. Maverick, how will the queries there put be answered in this case? 1. Was there an administrator and an order to sell, such as would authorize the administrator to make the sale? Undoubtedly there was an administrator, and a direct, unmistakable order authorizing him to sell. 2. Was the sale fair? There is no question of it. Then *de fide et officio judicis non recipitur quæstio* directly applies, and the question is settled.

Throckmorton & Brown, for appellees.—"The questions of fact were fairly presented to the jury, and by them determined, and the court will not undertake to revise their finding, because the court might be of a contrary opinion." (24 Texas, 288; 25 Texas, 88; 25 Texas, Sup., 376.)

Grimes' wife abandoned him, and left the State in his lifetime, and has never asserted any right or claim. (8 Texas, 312; 9 Texas, 630.) As tenants in common, appellees might maintain this suit. (16 Texas, 506.)

At the death of their father, appellees resided in the State. Their subsequent removal did not affect their rights. (17 Texas, 180, Green v. Crow.)

If the land in controversy was the homestead of Grimes at his death, then it passed to his minor children absolutely *eo instanti*, upon the death of the father; the estate being insolvent, the probate court had no juris-

diction over it. (See 17 Texas, 180; 21 Texas, 664; 30 Texas, 610.) Any order made relative to property not subject to the power of the court is void. The homestead rights of the widow and minor children stand upon a different basis to the rights of heirs in property received by descent. This right is superior to the claims of creditors and legatees. (See Runnells v. Runnells, 27 Texas, 515; Green v. Crow, 17 Texas, 187.)

It is insisted by appellants' counsel that the question of homestead was necessarily involved in the order for sales.

In this we think the learned counsel have fallen into an error. The question might have been determined if the children had been parties to the application for the order, but not otherwise, and such does not appear to have been the case.

In the cases cited the points held to be concluded by the action of the court were not incidentally, but directly and necessarily, involved in the proceeding. No authority goes further than to hold that such matters as under the pleading might have been determined, are concluded. These questions are necessarily involved in ordering the sale of land under the law of 1848; that there are debts remaining unpaid (or some special reason for it, as for partition, etc.); that there was not sufficient personal property belonging to the estate to pay the debts. If nothing appeared from the record to the contrary, the court would presume the existence of the necessity, and the order would be conclusive; but where the contrary is apparent from the record itself, no such presumption can be indulged. We will review some of the cases cited by appellants, and endeavor to show their inapplicability to this case.

Yates v. Houston (3 Texas, 433) is relied upon as authority. In that case the estate of James had been duly partitioned and the rights of the widow directly adjudi-

cated. The very gist of that proceeding was the interests of the claimants, and, in order to determine that interest, their relationship to the deceased. All persons interested were parties. The right to a specific portion of the estate depended upon this adjudication, and the court held the adjudication binding and conclusive.

In the case of Burdett v. Silsbee (15 Texas, 604), referred to by appellants, the question was as to the domicile of the deceased at his death. Every grant of letters of administration necessarily and unavoidably involved a determination of that question, and no letters could be otherwise granted; hence the grant of letters necessarily determined it, and such decision is held to be conclusive.

Lockhart v. White (18 Texas, 102) is a case in which the court did act upon the claim of the reputed widow, and having so acted, it was held to conclude an inquiry into her right; that her relationship was necessarily involved, and being so involved, the decision was final.

If appellees had applied to the court for the homestead, etc., it would necessarily have involved the decision of their relationship as children and their minority, and would have been conclusive of those questions; but no such application was made nor necessary to be made. (21 Texas, 664.) We hold that the order of sale was null and void, and conferred no title upon the purchasers.

In Withers v. Patterson, Judge Bell gives a clear and elaborate solution of the question of void and voidable judgments. On page 495, 27 Texas, the learned judge says: "There is, perhaps, no subject in reference to which it is more difficult to lay down precise rules by which every case can be clearly determined than the subject of the jurisdiction of courts."

In order to test the validity of this order, it is necessary to understand what power the court has, or what is

meant by jurisdiction. We again quote from same page and volume:

"The jurisdiction of a court means the power or authority which a court has, by the Constitution and laws, to hear and determine causes between parties, and to carry its judgment into effect. It is a plain proposition that a court has no power to do anything which is not authorized by law. The powers of our county courts, in respect to estates of decedents, are all conferred by statute. Whatever the statute authorized the court to do, it may rightfully do. But it does not follow, because the statute authorizes the court to sell lands under certain circumstances, that all sales of land by order of the court are authorized."

In speaking of the right to attack the judgment or order collaterally, the court, in the same case, on page 497, says:

"But the difficulty still remains of determining under what circumstances a party who seeks to impeach the judgment of a court will be permitted to do so. And here, in respect to the county or probate courts, it is important to keep before the mind the distinction between the orders or judgment of a court made or rendered in the progress of a rightful administration, touching matters concerning which the court has a right to deliberate and decide, and orders or judgments which the court has not the power to make or render, or has the power to make or render only under certain circumstances, and for certain purposes. Orders or judgments of the first class can never be collaterally impeached, because, however erroneous they may be, they are never void. Orders or judgments which the court has not the power, under any circumstances, to make or render, are, of course, null; and being null, their nullity may be asserted in any collateral proceeding where they are relied upon to support a claim of right."

It is quite clear that if the probate court had no power to sell the homestead, the order for that purpose is a nullity, and confers no title upon the purchaser.

We now come to consider the power of the probate court over the homestead of the deceased, and in order to make our position clearly understood, we will again refer to the character of title held by a widow and minors in the homestead.

By the Constitution and laws the homestead was protected from forced sale during the lifetime of the father, and creditors had no right to have it sold for the payment of their debts. At his death the law devolved this right, with its exemptions, upon the minor children, and the only jurisdiction given to the probate court over the property is to separate it from that over which it had jurisdiction. No power of sale is given to the court, nor implied by the law of 1848, but expressly denied to it by the Constitution of the State. It is argued that the mandate of the statute requiring of the court to do a particular act for the protection of the appellees, conferred the power to do another and different thing, which would defeat its objects. It is a singular deduction to draw from the authorities, and is in direct conflict with the case of Withers v. Patterson.

Counsel cited on other points: 33 Texas, 39, Blair v. Thorpe; 20 Texas, 29, Shepherd v. Cassiday; 20 Texas, 97, Gouhenant v. Cockrell; 32 Texas, 352, Mills v. Von Buskirk; 6 Texas, 310, Farmer v. Simpson; 28 Texas, 101, Dodd & Co. v. Arnold; 16 Texas, 472, Robertson v. Paul; 34 Texas, 617, Ryland v. Rogers.

Supplemental brief by *S. B. Maxey* and *M. A. Knight.* The subject of jurisdiction was elaborately discussed. Authorities cited: 13 Wallace, Johnson v. Townsly; 15 Texas, 604, Burdett v. Silsbee; 18 Texas, 102, Lockhart

v. White; 3 Texas, 433, Yates v. Houston; Broom's Legal Max., 705, 6 Am. Ed.; 31 Texas, 91, Hamblin v. Warneke; 18 Texas, 413, Franklin v. Coffee; 6 Texas, 102, Sampson & Keene v. Williamson; 7 Texas, 13, Wood v. Wheeler; 8 Texas, 314, Trawick v. Harris; 9 Texas, 630, Earle v. Earle; 13 Texas, 68, Lee and Wife v. Kingsbury; 17 Texas, 593, Methery v. Walker; 11 Texas, 252, Cornell v. Chandler; 14 Texas, 463, James v. Thompson; 27 Texas, 688, Little v. Birdwell.

WALKER, J.—The appellees claim the property in controversy as a homestead.

The appellant's claim under an administrator's deed, made by virtue of an order of the Probate Court of Fannin county. The law of homestead, although much discussed, is very difficult of administration in this State, as every case must be more or less affected by its own peculiar facts.

The appellants claim as the heirs of James Grimes, deceased, who in 1859 occupied the premises now in controversy, with the appellees, then his minor children.

In 1859 or 1860 he left the place, and, as well as we can ascertain from the evidence, removed to a place which he had purchased in connection with a married son.

This place was deeded to his son, and we will not be allowed to presume that he ever intended to make it his homestead; indeed, the testimony of the witnesses leaves it in some doubt whether he ever lived upon this place or not.

Grimes afterwards settled on lands lying within the railroad reservation, and probably had some intention at one time of fixing his homestead upon these lands, but had not parted with his title to the land now in controversy, and was certainly at liberty to return and take up his home there at any time he saw proper.

It appears that before going in the army in 1864, where he seems to have died, he did express his intention of returning to the home here in controversy, which went by the name of Honey Grove The plaintiffs were minors at the date of their father's death, and he left them no other home than the Honey Grove place.

The fact that this was his homestead at the time of his death is found by the jury, and we need not discuss the evidence on which the verdict is found, further than to say we deem it entirely sufficient to support the verdict. That the plaintiffs below are the legal heirs of James Grimes, and that they were minors at the time of his death, are facts not controverted.

It is perhaps proper to notice that James Grimes had a wife, who may have been living at the time of his death, upon whom his homestead might have descended, if she had been living with him, and had on his death become the head of the family; but it appears from the evidence that she had abandoned him and his minor children, under circumstances which probably render it unnecessary to discuss any supposed right of homestead in her to the property in question. She is not a party to this suit, and may never claim any interest in the property of the husband she had abandoned.

Looking alone at the record before us, we can have no doubt that the jury found correctly, and that the property descended as a homestead to the minor children of James Grimes.

But it is contended that the sale by the administrator, under the order of the probate court, is conclusive against the appellees, and that this proceeding cannot be collaterally impeached. There can be no doubt that the probate court has jurisdiction to determine what is the homestead left by a deceased person to his or her family. But there can be just as little doubt that neither the pro-

bate court nor any other court in the State of Texas has jurisdiction to order the sale of a homestead, to pay debts, where there is a family left who have the right to occupy it; and it is totally unnecessary to quote the authorities so often referred to by this court to support this doctrine. In this case there should have been no difficulty, there was no other real estate left by James Grimes at his death. An inventory was returned by the administrator which must have shown this fact. The rights of the minor heirs were totally disregarded, they were parties to no proceeding against them. No allowance was made in lieu of homestead, and their rights cannot be cut off by such an illegal proceeding. No equities attach to purchasers against them, for the probate court had no jurisdiction to order the sale. The judgment of the District Court is therefore affirmed.

AFFIRMED.

N. McMILLAN AND HER HUSBAND v. M. E. WARNER ET AL.

1. Where there is an abandonment of the homestead, with a fixed intention not to return, the property may be subjected to the demand of creditors; and it is error to instruct the jury that proof of acquisition of a new homestead is alone conclusive evidence of the abandonment of the old.
2. The question of abandonment is almost exclusively a question of intent, and that intent must be clearly established by the best accessible evidence, before a jury will be authorized in finding a relinquishment of any rights under the homestead laws; that a party has been absent for an indefinite period, is not sufficient to establish the fact of abandonment, unless accompanied with proof of intent not to return.
3. The declarations of a party before, at the time of, and after leaving his home, may be given in evidence to establish the intent; but the sworn statement of the party himself, taken in a court of justice, if credible, must settle the question, for he alone has full knowledge of that intent.
4. The act of May 19, 1871, repeals the common law rule heretofore in force

Statement of the case.

in this State, as to the disqualification of witnesses on account of interets, and, with one exception, removed all legal objections to their admissibility on account of interest in the issue tried.

Appeal from Walker. Tried below before the Hon. J. R. Burnett.

The appellee, Mrs. Warner (then Shannon), with her then husband, D. W. Shannon, occupied the house and lot in controversy, as their homestead, in January, 1859, at which time Shannon abandoned his wife, and left for parts unknown. She continued to reside at the house until the spring of 1861, when she removed to Houston, Texas, where she pursued the occupation of a milliner, having rented the house to a tenant, and employed an agent to collect the rents that should become due thereon.

The appellant, James McMillan, obtained a judgment against D. W. Shannon, on the twenty-seventh of July, 1861, for $65.89, and the house and lot were sold under execution, to satisfy this judgment, on the third of September, 1861, for the amount of the judgment and costs, to Nancy McMillan, appellant and wife of the plaintiff in execution. F. D. Thornton, the agent of Mrs. Warner, attended the sale, and claimed the premises sold as the homestead of his principal.

On the thirtieth of September, 1861, McMillan and wife brought an action of trespass to try title against Mrs. Warner's tenant, claiming title under the sheriff's sale, which action she defended, claiming the house and lot as her homestead, and judgment was rendered in her favor on the twenty-ninth of October, 1862.

The appellees intermarried in January, 1870. On the seventeenth of March, 1871, McMillan and wife brought their second action of trespass to try title, to which appellees objected, on the ground that the second suit was not brought within one year after the conclusion of the first action, which objection, being sustained by the Dis-

trict Court, was considered by this court at its last term, in the case of McMillan v. Warner, which was reversed and remanded.

On August 1, 1872, verdict and judgment were again rendered in favor of Mrs. Warner, from which judgment McMillan and wife prosecute their appeal to this court.

L. B. Hightower, for appellants.

Randolph & McKinney, for appellees.

OGDEN, J.—Section 1 of an act of the Legislature, approved May 19, 1871, provides "that in the courts of this State there shall be no exclusion of any witness on account of color; nor in civil actions because he is a party to, or interested in, the issue tried." This statute, by implication, repeals the common law rule heretofore in force in this State in regard to the disqualifications of witnesses on account of interest, and in civil actions, excepting in one instance, has entirely removed all legal objections to the admissibility of evidence on account of any pecuniary interest of the witness testifying, or because he is a party in or to the issue tried, thus admitting to the witness stand a large class of persons heretofore shut out, and leaving them to stand exclusively upon their credibility, and their statements to be weighed and determined by the amount of conviction they may produce. The statute is very emphatic, and when it says "there shall be no exclusion of any witness," it certainly comprehends not only the person, but also the manner of testifying, whether it be orally or by deposition, and declares, in effect, that parties to a suit and parties having a pecuniary interest in the same shall hereafter stand on the same footing as all other and disinterested witnesses. The court therefore did not err in admitting in evidence the depositions of Mrs. M. E. Warner, though a party to the suit.

There is, however, an error in the charge of the court which must be regarded as fatal to the judgment below. The jury were instructed in an additional charge as follows: "If you find that the property sued for was the homestead of the defendant, M. E. Warner, previous to the sale by the sheriff, then you will find for the defendants, unless the proof shows that at the date of said sale the defendant, M. E. Warner, had then acquired a new homestead."

This instruction declares in effect that no evidence, however strong and conclusive, is sufficient to establish the fact of an abandonment of one homestead but the proof of the acquisition of another; or, in other words, that it is impossible for a person to abandon a homestead by any act of the will or purpose, but that the same may cling to him through life, unless relieved from a possibly unwelcome incumbrance by alienation, or the acquisition of a new one. We think this is not the law, as enunciated in repeated decisions of this court. In the case of Trawick v. Harris (8 Texas, 310), the surviving wife had become a citizen of the State of Georgia, and the court says: "If so, she is as completely deprived of the homestead privilege as if she had acquired a new homestead in this State." In the case of Shepherd v. Cassiday (20 Texas), Hemphill, C. J., in delivering the opinion of the court, says: "We do not intend to assert the proposition that the old homestead remains until a new one is gained. This would, perhaps, too much embarrass and obscure the condition and rights of property to receive judicial sanction, there being no law or statute to that effect." And in the case of Gouhenant v. Cockrell (20 Texas, 98), the same learned judge says a homestead may be abandoned and disrobed of its guarantees, and the best evidence of this is that a new and permanent one has been acquired; but, he says, "we have held that less evidence

may be sufficient, and that where there is abandonment with a fixed intention not to return, the property may be opened to creditors." The same doctrine is held in Cox v. Shropshire (25 Texas, 123), in which it is said the abandonment had been established, "independently of the deed." These and other cases deciding the same point, we think have settled the question that a homestead may be abandoned without the acquisition of another.

The charge of the court is therefore erroneous; and if that error entered into the verdict of the jury, the cause should be reversed, that the jury may have the benefit of a legal charge upon this interesting question.

There is some conflict in the testimony in regard to the question of abandonment, which should have been considered by the jury under proper instructions; as upon the proper determination of that question hangs the decision of the entire merits of this case. The question of abandonment is almost exclusively a question of intent, since no legal abandonment can occur without a fixed intent to renounce and forsake, or to leave never to return; and to abandon a homestead a party must forsake and leave it with the intent never to return to it again as a homestead. Property may be abandoned as a homestead and still be held and occupied for other purposes, stripped of all the peculiarities or privileges which surround it as a homestead, and become subject to the demands of creditors.

But the intent to abandon must be clearly established by proof, before a jury would be authorized to find a relinquishment of any rights under the homestead laws, and that intent should be proven by the best accessible evidence. That a party has left his home and been absent for an indefinite period, would of itself be no sufficient evidence to establish the fact of abandonment, but such fact must be accompanied with the further proof

of the intent not to return. How that intent is to be established must depend to a great extent upon the circumstances and facts surrounding each case. The declarations of a party before, at the time of, and after leaving his home, may be given in evidence to establish the intent. But the sworn statements of the party himself, taken in a court of justice, if credible, must settle the question, for he alone has full knowledge of that intent, and his statements as to that intent can be directly contradicted by no human testimony. It is true that the testimony of a witness may be discredited to some extent by proof of contrary statements when not under oath, but such proof by no means impeaches or disproves his sworn testimony. A person when not under oath, and under the influence of passion, prejudice or any other exciting cause, may sometimes indulge in inconsiderate language not strictly true, but it is supposed that the sanctity of an oath will outweigh all exciting causes and awaken the conscience into speaking the truth; and when such testimony is given of the intent and purposes of the mind of the witness, it can be disproved only by clearly establishing the falsity of such testimony. But when a witness has been thoroughly impeached, or when his testimony has been clearly discredited or contradicted, in such a case his testimony as to the purposes of his mind should have but little weight with a court or jury.

There is another question raised by the record in this case which requires a brief notice here. The property now in controversy was sold under the McMillan judgment in September, 1861, and if up to that time Mrs. Shannon had not abandoned it as a homestead, then it was not subject to the execution sale, and the purchaser acquired no title. It therefore becomes important that the proof of abandonment should be confined to a period anterior to the day of sale. Mrs. Shannon or Warner may have

determined to abandon the property as a homestead since the sale to McMillan. If so, it may now be liable to seizure and sale; but this fact could in no manner affect the title of appellant, as all her rights under her deed must date from the day of sale. It was therefore error in allowing proof of an abandonment since the sheriff's sale.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

L. M. CLARK AND WIFE v. NOLAN & CAMPBELL.

1. At the death of the wife, the title to one-half of the homestead passes to and vests in the children of the marriage; and that half passes beyond the husband's power of alienation.
2. In changing a rural homestead into a town homestead, the lots made in dividing up the land, not used as a homestead, but merely kept for purpose of sale or speculation, becomes by such change community property; and at the death of the wife an undivided one-half interest passes to and becomes vested in the issue of the marriage, to the exclusion of all power or authority in the surviving husband over it.

APPEAL from Grimes. Tried below before the Hon. James R. Burnett.

The facts sufficiently appear in the opinion of the court.

Boone & Hutcheson, for appellants.

John C. Easton, for appellees.

OGDEN, J.—In 1856 James Nolan purchased from M. J. Duke one hundred and twenty acres of land within the present location of the city of Navasota, and settled upon it, with his wife and one child, as his homestead. In 1859 Nolan and wife deeded to the Houston & Texas

Central Railroad eighty acres of this land for a depot. About the same time Nolan laid off the remaining forty acres, which was the community property of himself and wife, into lots, blocks, streets and alleys, as a part of the town of Navasota, for the purpose of making sale of the same as town or city property; and, about the same time, he built a hotel, and other necessary buildings, upon two of the blocks, and moved his family into the same as his homestead. In the year 1860 Margaret Nolan died, leaving her husband and one child surviving, who continued to reside on the lots occupied by the hotel, until the marriage of Martha, the child, to Clark, one of the appellants. After the death of his wife James Nolan sold the lots, now the subject of this suit, and the daughter, Martha Clark, as the sole heir of Margaret Nolan, together with her husband, has brought this suit to recover the one-half of the land which she, Martha, claims to have inherited from her mother.

The cause was submitted to a jury in the District Court, and a verdict and judgment was rendered against the plaintiffs, and they have appealed.

There is no question that the land was the community property of James and Margaret Nolan, neither is there any question that it formerly composed a part of the homestead of James Nolan and his family. And the only questions presented by the record, which require a decision by this court, are, could James Nolan, after the death of his wife, Margaret, sell the homestead, or any part of the same, and make a full and perfect title to the purchaser? And if so, then were the lots, the subject matter of this suit, a part of the homestead of James Nolan at the time of the sale by him?

The homestead exemption, as provided for by the Constitution and laws of this State, was designed mainly as a protection against the eager pursuit of creditors; to se-

cure to the families of those who had been unfortunate in financial matters a home and a shelter, where the officers of the law dare not intrude. It is therefore wisely and humanely provided by the Constitution, that the homestead shall not be subject to forced sale. It is also intended as a special protection to the wife and helpless children of an improvident, reckless or worthless husband and father; and hence the provision, that the homestead shall not be sold, or encumbered, without the emphatic sanction of the wife, expressed in the most solemn manner. But when there are no creditors demanding payment of their debts, and no wife or family to be protected, or to interpose an objection to the disposition of the homestead, then the reasons for a constitutional or legal dedication no longer exist, and the property, which may once have been held as such, will no longer be subject to the rules or restrictions controlling the homestead as such.

It appears pretty certain that at the time of the death of Margaret Nolan neither she nor her husband owed any debts chargeable to their community property. If this be so, then Article 1305 expressly declares, that the homestead rights shall not prevent the partition and distribution of the estate of the deceased among her heirs and distributees. If this forty acres of land in Navasota was the community property of James Nolan and his wife Margaret, and at her death there were no community debts to be paid out of that property, then one-half of the land went to and became the absolute property of the survivor; and the other half immediately passed to and vested in her child and only heir, and became as absolutely the property of that child as the other half did of the survivors: and from the death of the wife and mother the father and child became equal owners, and tenants in common, of all the community estate of the deceased wife and surviving husband. Their estates and interests were,

in all things, separate and distinct, excepting that of possession and the right of possession. The father could no more alienate or encumber the rights or title of the daughter than the daughter could those of the father. The interest of the one was entirely distinct and independent of the other, and either might have demanded a partition of all the community estate after the satisfaction of the community debts, unless the actual homestead be excepted by the law from such distribution, and the use of it given to the survivor and minor children, so long as they remained a family, and the survivor the head of that family.

Whether James Nolan, after the death of his wife, and after the marriage of his only child, was entitled to the use of his former homestead, in exclusion of the right of that child, who was a tenant in common with him in that homestead, is a question which does not call for a decision in this cause, as other questions, more directly presented, must settle the rights of both parties. But we have no hesitancy in deciding that, under our law, the title to one-half of James Nolan's homestead even, at the death of his wife, Margaret, passed to and vested in his and Margaret's daughter, Martha; and, as a legal sequence, that half passed beyond his power of alienation, and any attempt on his part to sell or alienate that half interest was without authority of law, and therefore void. We think we are fully sustained in this view of the law, by the decision of this court, as enunciated by Chief Justice Hemphill, in the case of Sossaman v. Powell, 21 Texas, 664, and in many other cases subsequent to that decision.

We are also of the opinion that the act of 1856, Article 4648, Paschal's Digest, cannot be invoked as giving to Nolan the power of alienation of the community property, for the reason that there is no pretense that he ever complied with any of the terms of that act, which are pre-

scribed as pre-requisite of the power conferred. Under this view of the law we have no hesitancy in deciding that the surviving husband or wife has no more power of alienation over the homestead of a solvent estate, it being community property, than over any other portion of the realty belonging to that community. We think the testimony of C. C. Caldwell, on the trial of this cause, the donation to the Central Railroad, and the gift to his son-in-law, show pretty conclusively that James Nolan was not insolvent at the death of his wife, Margaret; and his subsequent indebtedness or insolvency could in no way affect his rights in or power over the community property of himself and his deceased wife. We think that the cases of Cragg v. Thompson, 24 Texas, 582, and Good v. Coombs, 28 Texas, 34, and others, fully sustain us in the foregoing opinion; and further, that the cases of Brower v. Wall, 28 Texas, and Tadlock v. Echols, 20 Texas, by no means come in conflict with either.

We might content ourselves with the decision of this first question raised by the record, as that must settle all others presented in this cause, but there is another which in our opinion is equally decisive of the rights of the parties to this suit, and which is distinctly presented by the pleadings in the case. Were the lots in controversy a part of the homestead of James Nolan and his wife, Margaret, at the time of her death, or were they a part of his homestead at the time of the sale by him? There can be no question that the homestead of Nolan and family originally covered the whole 120 acres purchased from Duke, and that there was no power in the Legislature, by the incorporation of the city of Navasota, or otherwise, to change, restrict or control that homestead, without the consent and approval of Nolan and wife. But Nolan and wife could at any time sell the whole or a part thereof at pleasure, and thereby destroy or ma-

terially change their homestead rights. There can be no doubt that they had a right to donate or sell to the Central Railroad eighty acres of that land, and thereby reduce their homestead to forty acres, which was still a rural homestead, and we can see no good reason why they should not have the authority to reduce that still further, and to convert the same, at pleasure, into a town or city homestead.

It may be true that they could not convert their homestead into a city without an act of incorporation, but it has been decided that the act of incorporation could not affect the homestead rights; and besides, it requires no act of incorporation in this State to constitute a town. There can be no doubt that they had a right to do as they did in laying off their entire homestead into lots, blocks, streets and alleys, and to build up a town on the same, by selling lots for business houses, residences and other purposes, and to select a residence and restricted homestead for themselves, while at the same time they caused a large number of town homesteads to be selected and built up around them. But it is most clear that by this act of theirs they voluntarily changed their homestead from a country to a town homestead, as contemplated by the Constitution and laws of this State. As a question of fact, they voluntarily abandoned their country homestead as such, and placed it beyond their power to resume it, or use it for the ordinary purposes of a country homestead, as contradistinguished from a town or city homestead.

Nolan, with the consent of his wife, laid off their land into town lots; they sold or abandoned their old residence as a homestead, and built up and moved into another, and thereby they changed their country to a town homestead. It would appear inconsistent with any definite idea of a distinction between a country and town

homestead, that Nolan should sell off lots and cause town homesteads to be erected all around him, and still preserve the right to claim the remainder of his land as a country homestead.

And now the only remaining question which need be noticed in this opinion, is, what is the extent of that town homestead; or rather, are the lots described in plaintiff's petition a part of that homestead? Giving the widest scope to the term town or city homestead which has been applied by any judicial interpretation in this State, it extends only to such lot or lots as are used for the convenience of the family, such as gardens or yards used and occupied for the convenience of the family, and the lot containing the office of a professional man, the shop of the mechanic, or the business house of the merchant, etc. (Prior v. Stone, 19 Texas, 372; Hamilton & Hancock v. Morgan and Wife, 17 Texas, 582; Methery v. Walker, 17 Texas.)

It is true that limitation is not to the number, but the value of the lots, and yet it is believed that a town or city homestead cannot properly be said to include vacant unoccupied lots, unappropriated to any use for the benefit of the family. Nor can the homestead legitimately be said to cover such lots as are held for the sole purpose of sale or speculation. It is believed that one lot worth not more than $500, if it alone be occupied as the homestead of the family, or used for the convenience of that family, will limit the extent of that homestead, in a town or city, as fully as though it was worth $5000.

There is no evidence in the record that Nolan ever used or occupied the lots in controversy, in any manner whatever, for the benefit of his family, after he had laid off the same into town lots, and we have failed to discover any reason or authority for including them within his homestead. They were, therefore, simply a part of the

community estate of James Nolan and his deceased wife, Margaret; and, at her death, the title to one undivided half of the same passed to and vested in her daughter, and only heir, in complete exclusion of all power or authority in the surviving husband over the same. And any attempt he may have made to convey more than his one-half interest, must be regarded as a mere nullity.

There is, therefore, manifest error in the judgment of the District Court, and it will be reversed, and the cause remanded for a new trial, in accordance with this opinion.

REVERSED AND REMANDED.

SUPREME COURT OF TEXAS.

JUDGE J. D. McADOO

Qualified as Justice of the Supreme Court August 30, 1873. From this date Hon. WESLEY OGDEN was Presiding Justice.

ARNOLD AND BRIDGES & NOLAN v. ADAMS, JORDAN ET ALS.
JAMES NOLAN v. GEO. W. REED ET AL.

N. owned a 120-acre tract of land adjoining the town of Navasota, occupied by him as a rural homestead, eighty acres of which he donated to the railroad. The corporation of Navasota extending its boundaries over the homestead of N., he subdivided his land into lots, selling off all but four blocks, which he still retained as a homestead. *Held*, that extending the boundaries of the corporation did not change the homestead from a rural to a town homestead; nor did the erection of houses for rent on the land retained, subject it to forced sale.

APPEAL from Grimes. Tried below before the Hon. James R. Burnett.

The facts sufficiently appear in the opinion of the court.

John C. Easton, and *Preston & Smith*, for appellants.

J. C. Hutcheson, for appellees.

McADOO, J.—In 1859 James Nolan lived upon a tract of 120 acres of land in Grimes county. In that year, when the railroad depot was located upon the tract, No-

lan donated to the Central Railroad 80 of the 120 acres. Nolan purchased the 120 acres from Duke in 1856, and settled and has lived on the land as a homestead ever since.

After his donation to the railroad the land was laid off, on which he resided, into lots and blocks, and which now forms a part of the town of Navasota.

In 1859 he erected on what is designated as Block 1 of Nolan's plan of Navasota, a few hundred yards west of his then residence, a hotel.

About the first of January, 1860, he moved his family into this hotel, and occupied that as a family residence. Immediately in the rear of this Block 1, which runs back 115 feet from the front on Washington street, on another block, numbered 17 on Nolan's map, and which is separated by an alley or passway from Block 1, he erected a small house for servants, and had his stables and well thereon.

These two blocks, so situated, were occupied as a homestead until 1865, when the hotel was burned. After the destruction of the hotel, Nolan moved into the small house on the rear block, and has lived, with his family, in that house ever since.

Some time after the fire he erected buildings on Block 1, which were rented out as business houses to divers and sundry persons, and the income therefrom has constituted the means of support of the family. Two or three houses have been sold by him; one to Arnold & Bridges, and one to Schafer. He has at all times claimed these two blocks as a homestead, and no more.

The proof shows that the property retained after the donation to the railroad, and after being divided into lots and blocks, was worth less than $2000.

Several judgments were rendered in the District Court of Grimes county against Nolan, previous to the convey-

ances of Nolan to Arnold, and Bridgers, and Shafer, in 1869. Executions were levied on all of block No. 1, including the lots of Arnold, and Bridgers, and Schafer. The several parties, Nolan, Arnold, Bridgers and Schafer, obtained writs of injunction restraining the sheriff and the plaintiffs in execution from selling the property levied on.

On final trials in the District Court of these injunction suits, the injunctions were dissolved, and by consent of all parties an appeal was taken to this court, all the causes to abide the result of this.

The only question for this court to decide is, is the property levied on subject to forced sale, under the Constitution and laws of this State? Is block No. 1 a part of the homestead of James Nolan, the appellant? Or has he, by reason of the facts disclosed, lost his hold upon it as a part of his homestead?

In 1856, and until 1859, it was a part of his rural homestead. In 1860, and until 1865, it was the very part of his homestead upon which he resided with his family. If the homestead lost its character as a rural homestead, on the laying out of the town of Navasota, it was still, in 1869, when the buildings were rented for residence, together with rear block No. 17, of less value than $2000. The two blocks became then the homestead of Nolan.

When the right once accrues as a rural homestead, can that right be destroyed except by an abandonment of it as such?

Does this erection of houses for rent, or other purposes, on a rural homestead, thereby destroy its character as a homestead? Clearly not. At the time the property was designated as a rural homestead there was no town near it. It was less than two hundred acres. He subsequently reduced it, by his donation to the railroad, to forty acres. He subsequently reduced it to two blocks. The proof

clearly shows that he was opposed to the extension of the corporate limits of the town over his remaining property. It was, nevertheless, embraced in the corporate limits. This fact brings this case directly within the rule of Bassett v. Messner, 30 Texas, 604.

In that case Judge Lindsay says: "Nothing appears in the agreed case to show that D. Messner, the head of the family, gave his express assent to the change of his rural to a suburban homestead. Possibly this express assent, had it been given by him, might have given some color of justice to the view insisted upon by the appellant, as the husband or head of the family, who has the power of disposition of the community property in acquiring, by his own act, a new homestead, exposes his old one to the rapacity of his creditors, if such he has. But even in this case it is very questionable if it would not require the concurrent assent of the wife, made manifest under due form of law, to change the character and nature of the homestead."

And Judge Lindsay concludes the opinion in that case in these words: "We conclude that the Legislature itself could not work this metamorphosis of a rural into a suburban homestead without the consent of these peculiar words of the Constitution; much less could the local municipal corporation of Brenham do so; and, certainly, we do not feel inclined, by any judicial interpretation, to achieve a result so repugnant to the letter and spirit of our domestic Constitution."

The judgment in the court below is erroneous, and must be reversed; and the proper judgment in the case is rendered here, that the injunctions in this case, and the others embraced in the agreement of parties, be perpetuated.

REVERSED AND RENDERED.

T. C. JORDAN ET AL. v. W. W. PEAK AND WIFE.

38 499
74 569

1. A deed of trust executed by husband and wife to secure a debt due from the husband, is such a conveyance of an interest in land as is contemplated by the act defining the mode of conveying property in which the wife has an interest.
2. The husband and wife may, by deed of trust duly executed and acknowledged in the manner prescribed by law, legally encumber the homestead to secure the payment of a debt.
3. A sale by the trustee under such a deed of trust is not a *forced sale* in contemplation of law.

APPEAL from Dallas. Tried below before the Hon. Hardin Hart.

Suit by Peak and wife to enjoin T. C. Jordan from selling under deed of trust certain town lots in Dallas, conveyed to him as trustee by Peak and wife, with power of sale to secure the payment of a note for $7642.55, due Leon & H. Blum. The note bears date March 25, 1871, and was signed by W. W. Peak, and J. W. Smith, his partner; it was given for goods purchased by the firm of Peak & Smith.

The lots were claimed and occupied as a homestead by Peak and wife. The appellants denied the existence of the homestead right in Peak and wife, set up the execution of the trust deed by them, their failure to pay the money to secure which the deed was made, and prayed for a dissolution of the injunction.

Among others the following instructions were given to the jury, viz:

"You are instructed that a deed of trust on the homestead is inoperative, and the wife is not bound by her signature to the same securing a debt made by her husband, in which she is in nowise interested, and which did not inure to the benefit of her separate property.

"If you are satisfied from the evidence that the note mentioned was given for goods, wares and merchandise, sold by defendants, Leon & H. Blum, to plaintiff, W. W. Peak, and J. W. Smith, and that plaintiff, M. F. Peak, afterwards joined W. W. Peak, her husband, in the execution of said trust deed to secure the payment of the same, and that there was no new consideration from said Leon & H. Blum to the said M. F. Peak, then and in that event her undertaking was and is not binding on her, and said trust deed inoperative and of no effect as to her."

There was a verdict for appellees, and judgment making the injunction perpetual.

Terrell & Walker, for appellants.—We submit that the trust deed to T. C. Jordan, for the benefit of L. & H. Blum, of March 25, 1871, conveyed, for the purposes of the trust, all the right which Peak and his wife had in the property, and this without reference to whether the property was then the homestead of appellees, or became the place of their residence afterwards. The constitutional provision affording protection to the homestead against forced sale, was certainly never intended to operate as a restriction upon the rights of owners to alienate as they might desire, when done voluntarily and in the manner prescribed by the statute, in Article 1003, Paschal's Digest.

If the entire fee may thus be disposed of, what reason is there why a less estate may not be? Cannot a term of years be acquired in the homestead property by the voluntary deed of the parties, made in conformity with the statute? Cases must often arise where protracted absence of the family, with no intention to remain permanently abroad, would demand the exercise of such a power for the protection of the property. If, then, a less estate

than a fee may be carved out, where is the limitation upon the right to sell the whole, or a part, conditionally, or to authorize another to sell it upon contingencies prescribed by the voluntary act of the owners in the instrument creating the power? The only limitations on the power of alienation are found in the statute which prescribes the form, and in the Constitution, which will not permit a sale unless it be voluntary. The decision in Sampson & Keene v. Williamson, 6 Texas, 102 (expressly affirmed in Burback v. Sykes, by a new court, in 24 Texas, 214), enunciates plainly the doctrine that the husband and wife may bind the homestead by mortgage, with power of sale over the separate acknowledgment of the wife.

This decision was re-affirmed by the entire court in Lee v. Kingsbury, 13 Texas, 71, in which Judge Wheeler says, "that the husband, with the concurrence of his wife, may, in the forms prescribed by law, create a mortgage on the homestead, has been heretofore decided."

And again, in Stuart v. Mackey, 16 Texas, 58, the decision in 6 Texas, 102, and the case of Lee v. Kingsbury, 13 Texas, 71, were both referred to and approved. In Stuart v. Mackey the Chief Justice says: "A mortgage by husband and wife of the homestead, to be valid, must be conditioned with a power of sale by the mortgagee, upon default of payment." In this case the appellants invoke no aid from the courts in the execution of the power. They seek no "forced sale," as that term is defined by this court, but ask only permission to execute a power not revokable, created by the voluntary act of the appellees, and in the manner pointed out by the statute.

The doubts which are understood to exist in the minds of this court as to the correctness of the decision in Sampson & Keene v. Williamson, is our excuse for discussing a proposition which we have long regarded as settled by that case. It had already been held in Hollis and Wife v.

Francois & Border, 5 Texas, 202, that the wife's right to mortgage her separate property for the payment of her husband's debts was beyond doubt. Now this could only be done by the wife in the manner pointed out by the statute (Pas. Dig., Art., 1003), and the same section contains provision for an alienation of the homestead. A careful analysis of that section will, we respectfully submit, show that the manner prescribed for alienating the homestead is not restricted to conveyances of the fee by deed, but applies, in terms, to "any other writing purporting to be a conveyance" of "any interest" in the land. The deed of trust or mortgage, with power of sale (for under our system they are held to have the same effect), did purport to be a conveyance. Now, regarding that instrument as a mortgage, was it a conveyance?

The very language in which a mortgage is defined by the following authorities answers the question: 4 Kent's Com., 138; Bov. Law Dic.; Walk. Am. Law, 293; United States v. Foster, 2 Cranch, 358; Conrad v. Atlantic Ins. Co., 1 Peters, 441; 1 Hilliard on Mortgages, 2; Porter v. Green, 4 Iowa, 571.

Opposed to the dissenting opinion of Judge Lipscomb in 6 Texas, will be found the lucid opinion of Chief Justice Shaw, defining the estate of the mortgagee, in Ewer v. Hobbs, 5 Metcalf, 3, to which we invite attention. That opinion is approved by Mr. Hilliard as settling the doctrine that as between mortgagor and mortgagee, for the purposes of the security, the mortgage is to be regarded as a conveyance of the fee.

The position assumed by counsel, that the law invests the wife with a separate estate in the homestead, and that she cannot encumber the same for the husband's debts, is based on an assumption which we deem erroneous. In this case the debt was a community debt, for the satisfaction of which the community property was liable, and

Argument for the appellants.

the homestead right of his wife, if it existed, invested her technically with no separate estate in the land. The homestead right is not technically an estate in the land, but only an inchoate right thereto. (Manson v. Atkison, 37 N. H., 337.)

The homestead exemption is a mere personal privilege, which does not run with the land, and which the State reserves to the debtor and his family, but which, like any other privilege, he and his wife may waive or transfer, if done in conformity with law. (Smith v. Bracket, 36 Barbour, 574.)

The homestead exemption law confers on husband and wife a personal privilege, which may be insisted on or waived at their option. It forces no privilege on them, nor does it compel them to withhold the appropriation of their property from the satisfaction of their debts. (Chamberlain v. Lyell, 3 Mich., 458.)

The authority of Sampson & Keene v. Williamson, and Hollis and Wife v. Francois & Border, has been shaken by no subsequent decision.

But we submit that if the law was erroneously construed in Sampson & Keene v. Williamson, it was in not giving effect to the deliberate purpose solemnly expressed in the mortgage, and in not holding that a judicial sale giving effect to the agreement of the parties was not that character of forced sale inhibited by the Constitution. The error, if there was any, was not in going too far, but in not going far enough.

But since that decision, twenty years have elapsed, during all which time the profession has recognized and acted on the authority of that case as settling the law. Under it rights were supposed to have been acquired everywhere, which, if this decision were overruled, would be unsettled at the option of the wife. Again, it must be remembered that since that decision, and in view of it as

settling the law, the present Constitution, which this court is asked to construe anew, was adopted, and we must suppose that the terms adopted in the homestead clause of that instrument were used with reference to the construction which they had already received. It follows that even if this court did violence to the spirit of the homestead clause in the Constitution of 1845, by its decision in Sampson & Keene v. Williamson, no such result can follow now in construing a provision in the present Constitution, almost identical in terms, and adopted with the judicial construction it had already received in that case.

Good & Bower, also for appellants.—It will be contended by appellee that a trust deed is not the alienation contemplated by the Constitution. As the common law of England is in force here, and alienations are creatures of that law, the Convention is presumed, in the absence of express provision to the contrary, to have used words with their common law signification. By that law an alienation of an estate is defined to be any method by which it is voluntarily resigned by one and acquired by another. (2 Bla. Com., 287.) See Tom. & Bouv. Dic., title Alienation: "An estate is the interest a person hath in property. This may be a freehold of inheritance, not of inheritance less than a freehold, or on condition." Among the last is *mortuo vadio*, and this is divided by Mr. Tomlin into: 1. Mortgages of freehold and inheritance. 2. Terms of years.

As to the effect of mortgages, see 1 Hilliard on Mortgages, 150, 151, 157, 158; 1 Peters' U. S., 441, 442; Parson's Law of Business, 490, 491. If the mortgage or trust deed is not an alienation, it does not come within the constitutional inhibition; it can be made by the husband alone, and the object of this provision is defeated. If it is an

Argument for the appellees.

alienation, then the consent of the wife is indispensable to its validity. Both at law and equity the owner of the fee could carve out and alienate a less estate. The object of the Constitution was to require the "consent of the wife, in such manner as may be prescribed by law" to every alienation. The "manner prescribed by law" extends to "any estate or interest in property of the wife," or "the homestead of the family." (Pas. Dig., Articles 1003, 1005.)

We know no judicial analysis of Article 1003, upon contracts involving the homestead, but it has been the subject of interpretation of the wife's contracts regarding her separate estate. (Hollis v. Francois, 5 Texas, 195.)

Should doubt exist, it ought to be dispelled by the exhaustive logic of Hemphill, C. J., in Sampson *et al.* v. Williamson, 6 Texas, 109. (See also Lee v. Kingsbury, 13 Texas, 71; Stuart v. Mackey, 16 Texas, 58.)

H. Barksdale, for appellees.—It is manifest that the language employed, both in the Constitution and law, we respectfully submit, looks alone to an absolute disposition of the homestead by husband and wife, and confers no power on them to encumber the same by mortgage or otherwise. To encumber the homestead by deed of trust or mortgage is not an alienation of it, and is in violation of the spirit and letter of the Constitution and law.

In support of the foregoing propositions the honorable court is referred to the very able and conclusive argument of Judge Lipscomb, and to the authorities cited by him in the case of Sampson & Keene v. Williamson, 6 Texas, 118.

A mortgage with power to sell is not distinguishable from a deed of trust, and any distinction attempted is purely technical. (Robertson v. Paul, 16 Texas, 474.)

The doctrine is now firmly established that a mortgage

is but a security for the debt—a mere "charge upon the land"—and that the mortgagee has, in effect, but a chattel interest. (Sampson & Keene v. Williamson, 6 Texas, 122; Buchanan v. Moore, 22 Texas, 541; 4 Kent, 160; 1 Wall. U. S. R., 53; 2 Story's Eq. Jur., §§ 1015–1023.)

Is the undertaking of the wife, to secure the debt of her husband and another, by deed of trust, made during coverture on the homestead, binding upon her? It will be seen by the honorable court that she is not a co-obligor in the note attempted to be secured, and the statement of facts show that the wife signed the trust deed without consideration to herself, or benefit to her separate estate, and that appellants, Leon & H. Blum, sold the goods to W. W. Peak and one J. W. Smith, before the execution and delivery of said trust deed, on the faith and credit alone of payment by them. Is the wife's undertaking, under these circumstances, binding on her?

This court says, in the case of Westbrooks v. Jeffers: "But it may well be doubted whether a widow is in any case bound to pay the debt of her deceased husband on a promise made during coverture, unless it be to pay for goods furnished during coverture on the credit of her separate estate." (See Westbrooks v. Jeffers, 33 Texas, 90; 11 Wendell, 312; 2 Sandf., 311; 15 Geo., 358; 1 Washburn, 325.)

Judge Parsons says: "The current of recent decisions in England is in favor of the view that the promise of a married woman has not, when given, any legal effect, and therefore is not voidable, but void." (1 Pars. on Contr.)

"The wife's disability to contract," says the same author, "is almost entire at common law." (p. 286; see also 1 Texas, 483.) But in equity it is said she may make contracts touching her separate estate, and encumber the same by mortgage or otherwise. We respectfully submit that the doctrine of the cases of Cartwright v. Hollis,

and Hollis and Wife v. Border, 5 Texas, has been in part overruled; and as we understand the subsequent cases, the court do not assent to the broad proposition that a married woman may encumber her separate property at pleasure.

Judge Moore says: "The separate property of the wife cannot be charged on an account made, or on a note executed, by her, jointly with her husband, for necessaries furnished for her husband, or for other members of her family than herself and children." (Hutchinson v. Underwood, 27 Texas, 255; Harrell v. Babb, 19 Texas, 346; Kavenaugh v. Brown, 1 Texas, 481.)

Now, we ask, if her separate property cannot be held liable on her express promise to pay a note, in which her husband joins, for necessaries furnished to him, would a deed of trust or mortgage on said property to secure the note be binding, or of any effect? We respectfully submit it would not.

The better doctrine is, that the wife's separate estate is a "statutory estate," and that no appeal will be allowed to other systems, or to the equitable powers of the court, independent of the statute, to charge the same. Says Judge Coke, "Whether such an estate can be made liable in any other mode than that prescribed by the statute, under any circumstances, it is not necessary now to decide." (See Stansbury v. Nichols, 30 Texas, 149; Pas. Dig., Arts. 4643 and 4644.)

We have cited and commented on above authorities in order to show the tendency of this court on the subject of married women contracting and binding their separate estate, and by analogy to arrive at her power to make contracts which will bind her homestead. It is said by Judge Wheeler, "The wife has at least an equal interest in the exemption of the homestead." (See Traynham v. Jackson, 15 Texas, 170.)

J. W. Ferris, also for appellees.

McADOO, J.—The record in this case presents the naked question, Can the husband and wife, by deed of trust duly executed and acknowledged in the manner prescribed by law, legally encumber the homestead to secure the payment of a debt?

The bill of exceptions and the assignment of errors present some other points; but a proper disposition of the main question disposes of all the points raised in the record.

Now, what is the case presented by this record?

Mrs. Peak joined her husband in the execution of a deed of trust, upon property claimed as the homestead of the family, to secure the payment of a sum of money due by note to L. & H. Blum. The conveyance was made to F. C. Jordan, as trustee, and was acknowledged by the husband and wife in the manner pointed out by law. The deed of trust is in the usual form of such instruments, and contains in it the power of the trustee to advertise and sell the property on the non-payment of the debt, as stipulated in the deed. The note was not paid at maturity, and the trustee was proceeding to execute the trust, by sale of the property, when Peak and wife sued out a writ of injunction to stay further proceedings by the trustee. On final trial in the District Court, a decree was rendered perpetuating the injunction, and the defendants in the court below have brought the case to this court by appeal.

The question involved in this case is not a new one in this court. It was fully presented, was ably and thoroughly discussed, and clearly decided in Sampson & Keene v. Williamson, 6 Texas, 102, in a well considered opinion of Chief Justice Hemphill.

In that case there was a dissenting opinion by Judge

Lipscomb, characterized by the ability of that distinguished judge. But, notwithstanding the dissenting opinion of Judge Lipscomb in that case, this court has uniformly held in all subsequent cases presenting the question, that the rule laid down by the court on this subject in that case was settled law.

In the case of Hollis and Wife v. Francois & Border, 5 Texas, 195, the court held that the wife has the power to join her husband in a mortgage of her own lands, for the reason that she can join with him in their absolute sale; and the rule was said, in that case, to be found in all the authorities.

This authority, to bind her separate estate for the payment of debts, extends to the debts of the husband as well as debts contracted for her separate use and benefit. In order thus to encumber her separate estate it is only necessary that the deed be executed by her in the mode pointed out by law.

If she can, by deed of trust or mortgage, with power in the trustee or mortgagee to sell on the non-payment of the debt, encumber her separate estate, why can she not so encumber the homestead? And her power to do so is based on the same rules in Sampson & Keene v. Williamson. Is not her power to do so stronger, even, in the case of the homestead than in the case of her separate property? The fee in the land in the latter case is in her; in the former, if community property, it is in the husband. In the latter case, she, with him, charges the estate with the mortgage; in the former he does so with her consent, obtained in legal form. His power to sell the homestead absolutely, or to convey it by gift, or to encumber it in any manner he sees fit, is limited only by her consent, obtained in the mode pointed out by law. He cannot, it is true, so bind it by mortgage, even with her consent, that it can be subjected to forced sale; nor could he so bind it

if he were a single man, and the head of a family; not because the homestead cannot be conveyed, or a mortgage or trust cannot be created upon it, but because a *forced* sale of it is forbidden by the Constitution of the State. More than this, there is no limit to the power of conveyance or disposal of the homestead, with the formal legal consent of the wife.

If property can be legally encumbered at all by mortgage, with power to the mortgagee to sell, then a single man who is the head of a family can so mortgage his homestead; for there is no legal prohibition or restriction whatever, except the prohibition of forced sale. If a married man, he has precisely the same control over the homestead as he would have if single, if the wife join with him in the deed, in proper form of acknowledgment.

In no case, however, and under no circumstances, can the homestead be bound by a mortgage which needs to be enforced by a foreclosure; and no sale of it by reason of such mortgage can be effected under an order or decree of a court, or under any process of a court. The prohibition of forced sale is absolute and complete.

It is urged that the opinion of Chief Justice Hemphill in Sampson & Keene v. Williamson was *obiter dicta*, because in that case the mortgage contained no power in the mortgagee to sell, but could only become operative by a foreclosure and forced sale; and the mortgage was adjudged to be inoperative and void in that case.

But the whole question of the power to charge the homestead *at all* was pressed upon the court in the arguments and briefs of counsel, and the question was one of such vital concern in the business affairs of the country, that it was deemed of great importance that the opinion of the Supreme Court be had upon it.

Were this the only case in which the question had

been passed upon by this court, whatever might be the force of Judge Hemphill's reasoning in his opinion, that case would not be certainly regarded as settling the law on the subject.

But as the question has arisen in numerous cases since, and this court has uniformly held the law as laid down in that case as settled by it, and reference has invariably been made to it as authority, it would scarcely now be proper to regard it otherwise than the very highest authority. In Lee v. Kingsbury, 13 Texas, 71, Judge Wheeler says: "That the husband, with the concurrence of the wife, may, in the forms prescribed by law, create a mortgage on the homestead, has been heretofore decided;" and he refers directly to Sampson & Keene v. Williamson as the case in which it had been decided.

It may be proper to notice more closely and in a more extended manner than it has been done in a previous part of this opinion, the question so earnestly urged by counsel, whether a trustee or mortgagee, acting under a deed of trust or mortgage, with power in the trustee or mortgagee to sell the property without foreclosure, can sell in any case after the breach of the conditions of the mortgage, against the consent of the mortgagor at the time of the sale.

If the mortgagor objected to the sale before the sale is completed, does this objection revoke the power? Is the power revocable by the mortgagor at all? Can the power be revoked in any manner, or by any authority, short of a decree of a court of equity? Will a court of equity interpose to revoke the power while the conditions remain undischarged, simply because the mortgagor desires to recede from the contract? Will a court of equity in such a case override a rule as old as equity itself—"he who *seeks* equity must *do* equity?" And is this rule varied either with the class of persons or the character of prop-

erty involved? Does the rule vary because the mortgagor is a married woman, or the property is a homestead?

It is insisted that a mortgage, or deed of trust, to secure the payment of a debt, is not a *conveyance* in the sense in which that word is used in Article 1003, Paschal's Digest, and that therefore no estate, or interest in the property mortgaged, vests in the mortgagee or trustee, which he can convey.

Now, what is a mortgage or a deed of trust executed to secure the payment of a debt?

"A mortgage may be described as a conveyance of lands from a debtor to his creditor." (Bouvier's Law Dictionary.)

"A mortgage is a conveyance of an estate by way of a pledge for the security of a debt, and to become void upon the payment of it." (4 Kent, 138.)

"A mortgage is a conveyance of property, and passes it conditionally to the mortgagee." (U. S. v. Foster, 2 Cranch., 358.)

A mortgage is not only "a security for the debt, but it is something more. It is a transfer of the property itself as a security for the debt." (Conrad v. Atlantic Insurance Co., 1 Peters, 441.)

"A mortgage not only creates a lien, but operates to transfer to the mortgagee a qualified or conditional estate." (Porter v. Green, 4 Iowa.)

A mortgage is "a conveyance of the estate by way of pledge," etc. (1 Hilliard on Mortgage, 3.)

In Ewer v. Hobbs (5 Met., 3), Chief Justice Shaw said: "The first great object of a mortgage is" (as in this case) "to give to the mortgagee an effectual security, by pledge or hypothecation, of real estate, for the payment of the debt, or the performance of some other obligation. The next is to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through

him, the full and entire control, disposition and ownership of the estate, subject only to the first purpose—that of securing the mortgagee. Hence it is, that as between the mortgagor and the mortgagee, the mortgage is to be regarded as a conveyance in fee; because that construction best secures him in his remedy and his ultimate rights to the estate, and to its incidents, the rents and profits; but in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with as the estate of the mortgagor; and all statutes on the subject are to be construed, and all the rules of law or in equity are to be applied, so as to carry these objects into effect."

Mr. Hilliard regards the opinion of Chief Justice Shaw, quoted from above, as settling the doctrine that, for the purposes of the security, the mortgage is to be regarded as a conveyance of the fee.

It appearing, therefore, from the foregoing reasoning and authorities, that a mortgage or a deed of trust is a "conveyance," in the sense in which that word is used in Article 1003, Paschal's Digest, it follows that a trustee is not precluded from the power to sell because of the want of title in himself sufficient to enable him to convey the fee in the land mortgaged to a purchaser.

In the early English decisions, when the practice was introduced of authorizing the mortgagee to sell the property for the payment of the debt, and which practice was introduced to avoid the difficulties and delays attending bills to foreclose, the validity of the power was questioned.

Lord Eldon declared that such a deed was of a very extraordinay kind—as it certainly was then, being of recent origin—and that there were clauses in it upon which it

would be very difficult to induce a court of equity to act. But still the practice grew, until it gained a substantial footing in the English courts, while in the States of the American Union the doubts of Lord Eldon seem never to have been entertained by the courts. (4 Kent, 146; Robertson v. Paul, 16 Texas, 474.)

That such a power is valid is now well established, not only by this court, but, so far as we can discover, by all the courts in this country and England.

The courts, and the profession generally, have regarded this doctrine as settled law, until quite a recent period. Unfortunately, we think, for the jurisprudence of the State, and for the security of the rights of property, and the good of society, the legal mind of the State has manifested, not only on this, but on other settled questions of law, a disposition, too much in accord with the general spirit of the times, to regard nothing as *settled;* everything as open to controversy. This court at least does not share in that disposition. If this were a new and unadjudicated question we would, if in doubt as to the correct rule, adopt that doctrine which, to our minds, presented the better and the sounder reason. This would be our only guide. But where a doubt should exist in a case which involves the overruling of the former settled decisions of this court, and a destruction of the rights of property to the extent of many millions of dollars, created by contracts entered into in accordance with the settled decisions of this court for nearly a quarter of a century, we would feel the duty imperative to give the former settlement of the law the benefit of the doubt.

We do not, however, entertain a doubt as to the soundness and correctness of the former decisions of this court on this subject. We believe the law on this subject was correctly settled in the first instance by our predecessors, and that there is *every* reason why the former decisions

should be maintained, and *none* that they should be overruled.

We therefore hold that this cause must be reversed, and the injunction dissolved, and the cause dismissed.

REVERSED AND DISMISSED.

J. C. RICHARDS v. MARY A. NELMS AND J. T. NELMS.

1. A city homestead of the maximum value cannot be increased by purchasing additional adjacent lots.
2. Nor did the act of February 2, 1860, alter this rule.
3. The increase in value protected by said act is that occasioned by the appreciation in value of the land, and by improvements made thereon.
4. In computing the value of a city homestead, where it is sought to extend its limits, the improvements must be included in the valuation.

APPEAL from Grayson. Tried below before the Hon. F. W. Hanford, special judge.

The facts are set out in the opinion.

Maxey & Hare, and *W. M. Walton*, attorneys for appellants, cited Paschal's Digest, 2 Ed., 3928; Williams v. Jenkins, 25 Texas, 305; Paschal's Digest, notes 198, 481, 897; Pryor v. Stone, 19 Texas, 373; Hancock v. Morgan, 19 Texas, 582; Norton v. Shearn, 15 Texas, 176; Sampson v. Williamson, 6 Texas, 119; Paschal v. Cushman, 26 Texas, 74.

Hancock & West, attorneys for appellees, after discussing the above authorities, cited Story's Conf. of Laws, Chap. 3, § 41; Art. 7, § 22, Constitution of 1845; Murphy v. Coffey, —— Texas; Bassett v. Messner, 30 Texas, 604; Mackey v. Wallace, 26 Texas, 526; Act of Feb. 2, 1860, Paschal's Digest, 3928; Act of Nov. 10, 1866, Pas-

chal's Digest, 2 Ed., 3802; Campbell v. McManus, 32 Texas, 442; Moore v. Whitis, 30 Texas, 440.

McADOO, J.—In the agreed statement of facts in this case, it is admitted that when the undivided one-half of lot No. 1, in block No. 8, in the town of Sherman, the property in controversy, was purchased, the lots which already formed the residence and homestead of Nelms and wife (November 5, 1859) exceeded in value two thousand dollars.

It is claimed that this property, on its acquisition, separated by a street and several lots from the residence, notwithstanding the value of the previously occupied homestead was of greater value than two thousand dollars, became a part of the homestead. We think not.

Aside from the question as to whether a mere undivided interest in land can be embraced in the term homestead, under our law (which we deem it unnecessary to discuss in this case), the first question which arises in the consideration of this case, is, Could the homestead be further increased under the law, as it then was, by the addition to it of other property, the then homestead being over two thousand dollars in value? Was not the measure of homestead already full, and more than full, before this last purchase was made?

It is true at the time the original property was dedicated as a homestead it was only worth about $1200. It increased in value until, when this last purchase was made, in November, 1859, it had become of greater value than $2000. Whether this increase in value was the result of additional improvements, or the simple enhancement by natural appreciation, does not appear, nor, in our opinion, does it matter; it was worth over $2000 *then*.

If this last purchase became a part of the homestead at all, it became so on the fifth day of November, 1859; and

viewed in the light of homestead, it must be regarded in connection with the other property used and occupied as such. As to this property, it must be regarded as property that day dedicated as homestead, if at all. The then value of the previously acquired property cannot be ignored, and this last purchase be made to relate back to the time of the original dedication in order to bring the whole within the legal homestead value.

Now, before the last purchase was made, the homestead value was complete. No addition could be made to it by dedication of newly acquired property. The property in controversy did not and could not become homestead at that time. Indeed, at that time, under the decision of Williams v. Jenkins, 26 Texas, a further increased value of the old homestead would not have been protected under the then existing homestead law.

But it is urged that the debt by reason of which the property in controversy was sold by the sheriff, was contracted after the passage of the act of February 2, 1860. So it was. Does that change the state of this case? It cannot possibly do so. The statute of February 2, 1860, reads as follows: "The homestead in a town or city exempt from forced sale is hereby declared to be a lot or lots, occupied or destined as a family residence, not to exceed in value two thousand dollars at the time of their destination as a homestead; nor shall the subsequent increase in the value of the homestead, by reason of improvements or otherwise, subject the homestead to forced sale." (Paschal's Digest, Art. 3928.)

We have shown that this last purchase was not, and could not become, a part of the homestead under the former law. Does this latter law make it a part of it? By what rule of construction or reasonable interpretation can it be added to the homestead by virtue of this statute?

If under that statute this property can be embraced in

the homestead, then where is the end to a city or town homestead? If, under that statute, the property in controversy is made a part of the homestead of Nelms and wife, then may a homestead not over $2000 in value be dedicated and the owner of it acquire every other lot in the town or city and hold it all under the said protection of homestead exemption? We deem it safe to say that the Legislature meant no such thing.

The homestead statute of February 2, 1860, did not increase the *maximum* value of the homestead at the date of its dedication. That *maximum* value was precisely the same as that fixed in the former law. The only change consisted in protecting the subsequent increase in value after dedication, "by reason of improvements or otherwise." By the term otherwise we understand the subsequent increase in value of the property by any kind of appreciation in *value* was meant; not a further increase by addition of other lots and other undivided interests in lots, either adjacent to or remote from the lot or lots occupied or destined as a family residence.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

SOPHIE E. BAYLOR AND JAMES DAWSON v. SAN ANTONIO NATIONAL BANK.

Where a homestead has been dedicated under a former law, but has increased in value not to exceed the amount now reserved from forced sale under the Constitution of 1869, it will still be protected as a homestead.

APPEAL from Bexar. Tried below before the Hon. Geo. F. Noonan.

Argument for the appellants.

James Dawson executed his two notes, one of which matured on the fourteenth day of January, 1859, and the other on the first day of March, 1859. Suit was instituted on them, and property attached, February 21, 1861. Final judgment obtained April 1, 1868, and the property attached ordered to be sold. After the execution of the notes, Dawson conveyed, by deed of gift, to his mother, Sophie E. Baylor, for life, the property attached, and she brought this suit to enjoin the sale of the attached premises, claiming them as her own. Many issues were raised by the pleadings; but as they were all settled by the verdict of the jury satisfactorily to the parties, it is unnecessary to refer to them. This controversy arose on the entering of the decree by the court.

It was not denied that the homestead exemption should be allowed, but appellants contended it should be by the law in force at the rendering of the decree, June 15, 1873, while appellee insisted that it should be by the law in force at the time the contract was made. To the latter view the court inclined, and the decree was so entered.

The verdict was as follows, viz.:

"We, the jury, find for the plaintiff, the homestead to consist of four acres, at three hundred dollars per acre; improvements thereon valued at seven thousand dollars. We believe James Dawson not guilty of the intention to defraud his creditors."

On this verdict a decree was entered ordering the property to be sold, two thousand dollars of the proceeeds to be paid to Mrs. Baylor, and the excess to be applied to the payment of a judgment in the case of John H. French v. James Dawson, now owned, as the decree recites, by the San Antonio National Bank.

Wælder & Upson, for appellants.—The court erred in entering the decree and final judgment, for the reason

that it is contrary to law, contrary to the facts, and contrary to the verdict of the jury.

We think we are sustained by authority when we assume the ground that the exemption applicable here is the provision of the Constitution of 1869 (2 Vol. Pas. Dig., page 1124), exempting from forced sale any city lot or lots, not to exceed $5000 in value at the time of their destination as a homestead, and without reference to the value of any improvements thereon.

The claim of the exemption may be made available if, at the sale, the homestead right exists. The case of Stone v. Darnell, 20 Texas, 11, is clear upon this point. It was there decided that where, after the levy of an execution, the defendant in execution built a house on the land levied on and moved into it before the sale, the property was exempt from forced sale as a homestead.

In this case the injunction was sued out, and thus the claim to the exemption was asserted before any sale was attempted. This being so, we ask and answer in the language of Chief Justice Hemphill, in the case just cited (20 Texas, 14): "Was or was not the land or lots the homestead of the debtor at the time of the forced sale? If it was his homestead at that time, it seems incontrovertibly clear, under the Constitution, that it is not subject to forced sale." It follows as a corollary that if the claim can be asserted at the time of the sale it is available, according to the law then in existence. The time of sale in this case has not yet come. Being asserted, we submit that the law in force at the time of the rendition of the judgment of the District Court in this case is the law which should have governed the decision; and that law was the constitutional provision of 1869.

In the case of Woods v. Wheeler, 7 Texas, 13, debts were contracted in 1845, prior to the adoption of the Constitution of 1846. Although the court decreed a sale of

the homestead, yet it directs a distribution of the proceeds of an estate in accordance with the constitutional provision; that is to say, this court decreed the benefits of the homestead exemption as against creditors, although it had no existence at the time the debts were contracted. Texas is not alone in her liberality of construction upon this subject. Other States, having similar provisions of law, have been equally liberal.

Thus the Supreme Court of Ohio has said that the proper time for the assertion of the debtor's claim under the statute, to have such homestead exempted from sale, is when the sheriff or other officer is about to execute the writ of execution or order of sale; and the claim is available as well against decretal orders of sale as against executions founded on judgments at law. (Sears v. Hawks, 14 Ohio, N. S., 298.)

In Kansas a judgment rendered prior to the adoption of the Constitution cannot be levied upon the homestead of the debtor, which is exempted from execution under Section 9, Article 15. (Cusic v. Douglas, 3 Kan., 123; Root v. McGrew, Ib., 215.)

In Georgia the adjudications since the adoption of its Constitution of 1868 are to the effect that the homestead provision of the Constitution is retroactive, and applies to judgments, executions and decrees founded on debts contracted before its adoption, even though reduced to judgment before that time, unless they fall within the exceptions provided for in the Constitution. Pulliam *et al.* v. Sewell *et al.*, 40 Georgia, in which the court say that a homestead is not subject to the payment of a judgment obtained prior to the passage of the homestead law.

In North Carolina it has been held that the homestead and exemption laws apply to debts existing before the adoption of the Constitution of 1868 (providing exemp-

tions); debts not being a lien upon the property of the debtor. (Hill v. Kesler, 63 N. C., 427.)

The decisions here referred to are deduced, no doubt, from the settled and generally understood principle that laws of the character of the one under consideration properly belong to the remedy.

Judge Cooley, in his work on Constitutional Limitations, holds this language: "Nor is there any constitutional objection to those laws, which except certain portions of a debtor's property from execution, being so modified as to increase the exemptions, and the modifications made applicable to contracts previously entered into. * * * * * *

"Regulations of this description have always been considered, in every civilized country, as properly belonging to the remedy." (Cooley's Const. Lim., 287; Bronson v. Kinzie *et al.*, 1 How, 315.)

"Thus, a law abolishing distress for rent has been sustained as applicable to leases in force at its passage." (Cooley's Lim., 288, referring to Van Renselaer v. Snyder, 9 Barb., 302; and 13 N. Y., 299; Guild v. Rogers, 8 Barb., 502; Conkey v. Hart, 14 N. Y., 22.)

"Does any one doubt that a State Legislature may abolish imprisonment for debt as well on past as future contracts?" as per Justice McLane, in Bronson v. Kinzie *et al.*. 1 How, 328.

"Without impairing the obligation of the contract, the remedy may certainly be modified, as the wisdom of the nation shall direct." (Sturges v. Crowninshield, 4 Wheat., 200.)

In considering the effect of laws upon contracts made prior to their enactment, Justice Parsons says: "It is admitted that a State may make partial exemptions of property, as of furniture, food, apparel, or even a homestead." (2 Pars. Cont., 534.)

It is held in Michigan that property may be exempted from execution for debts contracted before the law of exemption was enacted. (Rockwell v. Hubbell, 2 Doug., 38.)

Judge Cooley lays it down as a principle, that exemptions of property from executions are always subject to be recalled by the Legislature. (Const. Lim., 383.) Upon the same principle, as we have already seen, they may be modified, extended, enlarged; and the modification may be made available up to the very time when the forced-sale is about to be made. And if, for any reason, a sale should be postponed, and between the postponement and subsequent time of sale any change in the exemption laws should be made, we see no reason why such change should not inure to the debtor or creditor, as the case may be. The principle seems the same throughout.

S. G. Newton, for appellee.

WALKER, J.—The only question presented by this record, for our consideration, is, whether the law in force in 1857, touching the homestead exemption, or that now in force, should govern the decision of the case.

James Dawson purchased the property in April, 1857, improved and occupied it as a homestead for himself, his mother, the appellant, and her family, and she continues to occupy it for that purpose.

Dawson gave the notes, on which suit is brought, to French and Favor between one and two years subsequent to the purchase of the property from the Vances; and there does not appear that these notes have any connection whatever with the purchase of the property in controversy.

Dawson deeded the property to his mother on the twelfth of March, 1860; the consideration was natural love and affection. Had the jury found that this deed was made in fraud of the rights of creditors, a much more

serious question than any presented in the record would have been met; but the jury say, "We believe James Dawson not guilty of the intention to defraud his creditors."

This finding is decisive of the whole case.

If Mrs. Baylor took the property relieved of any fraud in the conveyance, then it is not liable for James Dawson's debts, though no attribute of homestead attached to it.

But the parties raise another question upon which they invoke the decision of the court, and we have no hesitation in deciding that this homestead, and all others, are to be protected by the law as it now stands. The Constitution of 1869 fixes the amount and value of the homestead exemption, and it will govern all cases where the homestead has not been set apart under any other law; or, in other words, where a homestead has been dedicated under former law, but has increased in value not to exceed the amount now reserved from forced sale under the Constitution of 1869, it will still be protected as a homestead.

The controversy here arose on entering the decree. The decree should have given the appellant the property, and such is the judgment of this court.

REVERSED AND RENDERED.

ANN M. MALONE ET AL. v. JULIUS KAUFMAN.

1. Where a party advances money to relieve a homestead from the lien for unpaid purchase money, and takes from the purchaser and his wife notes for the amount advanced, and a deed of trust to secure their payment, he is not thereby subrogated to rights of the vendor, and the homestead is relieved from the lien for purchase money.
2. In such a case the notes and the deed of trust, being for money loaned, the contract is not such an one as can subject the homestead to forced sale, whatever may have been the intention of the parties to the contract at the time.

Statement of the case.

3. The vendor's lien is not a creature of contract, but is an incident to a contract for the purchase of land, growing out of that specific kind of contract by operation of law.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

In November, 1860, Charles R. Hughes sold to Edward Malone (the husband of Ann M. Malone and the father of the other appellants) a lot in the city of Galveston, with improvements thereon, for four thousand dollars—two thousand thereof cash, and two thousand in notes of the purchaser, at one and two years, secured by deed of trust executed to Stephen Southwick and Henry Van Buren.

In 1865 Mrs. Wood was in possession of the premises, and owned the notes given by Malone to Hughes for the purchase money. She refused to deliver possession to Malone until the notes were paid.

In order to obtain possession, Malone procured Kaufman to buy the notes from Mrs. Wood. These notes were then canceled, and the notes sued on executed to Kaufman by Malone, in consideration of Kaufman's advance. The court charged: "If the jury believed, from the evidence, that the notes sued on were given for the amount of the unpaid principal and interest due Hughes, from Malone, for the purchase of the lots mentioned in the pleadings, and that the notes originally given were canceled, and these notes given in lieu of them, in order that the purchaser might obtain possession of said lot, which was then held by the vendor, and with the express understanding that the plaintiff thereby assumed the place and rights of said vendor, you will find for the plaintiff the amount due on the notes sued on, and that the lot is subject to the payment of said amount as part of the purchase money. * * * * The jury will find whether the notes were given for the unpaid purchase money of the property bought by Malone from Hughes."

The jury found that the notes were "given for the unpaid purchase money of the property bought by Malone from Hughes," and gave plaintiff a verdict for their amount, $2583.26. The court thereupon rendered judgment against the minor defendants for that amount, and directed the sale of the property involved for its satisfaction.

McLemore & Hume, for appellant.—The vendor's lien does not arise in favor of a third party who pays the purchase money to the vendor for the purchaser and takes the latter's note for the amount. (2 Washburn R. Prop., p. 92; Nott's Appeal, 45 Penn. S. R., 361; Stancel v. Roberts *et al.*, 13 Ohio, 156; Skaggs *et al.* v. Nelson, 25 Miss., 94.)

Edward T. Austin, for appellee.

MCADOO, J.—The contract on which this suit is based is a new one, entered into by a third party, and one of the parties to an old one.

Hughes sold lot 1, block 314, in the city of Galveston, to Malone, taking two notes of Malone as part of the purchase price of the lot. Malone and wife also executed a deed of trust for Hughes' benefit, the property being made a homestead.

In 1866, $2000 being still due on the two notes, at the request of Malone, Kaufman, the appellee, advanced the money to Malone to take up these two notes.

They were taken up and canceled, together with the deed of trust.

In consideration of this advancement of the money to Malone to relieve the homestead from the burden of these two purchase money notes, Malone executed two new notes to Kaufman, and he and his wife executed a deed of trust to secure Kaufman in this advancement made to

take up the two notes for purchase money, to the holder of the notes to Hughes.

This was a new contract, and between different parties; not between Malone and Hughes, but between Malone and Kaufman.

The moment the money was paid to the holder of the purchase money notes, no matter whence derived, the purchase money was paid, the vendor's lien on the lot was discharged, and the deed of trust for the benefit of Hughes, the vendor, became null.

Had Kaufman dealt with the holder of the purchase money notes, paid his money to him as a purchaser of the notes, the vendor's lien would have inured to him as an incident to the notes. But he saw fit to make a new contract; to deal with Malone and not with the holder of the notes; and the new contract, not being for purchase money, but being for money loaned, the contract is not such an one as can subject the homestead to forced sale, whatever may have been the intention of the parties to the contract at the time.

It is evident that the parties did undertake, by this new contract, to substitute the new contract for the old. They did intend to invest the new contract with the superior force of a vendor's lien; but still it is not a contract for purchase money, which alone could give it that force, and the courts of this State cannot enforce a contract of the kind. The Constitution absolutely forbids forced sales of the homestead, except for purchase money, and the courts are thereby prohibited from making such orders of sale, though the parties, at the time of making the contract, intended it to have the force of a vendor's lien. The vendor's lien is not the creature of contract, but is an incident to a contract for the purchase of land, growing out of that specific kind of contract by operation of law.

The principle above stated in regard to the non-subro-

gation to the rights of the holder of the vendor's lien, is clearly laid down in Flynn v. Flanagan, 25 Texas, 778; also in Nott's Appeal, 45 Penn. S. R., 361; and Stancel v. Roberts *et al.*, 13 Ohio, 156; and in Skaggs *et al.* v. Nelson, 25 Miss. R., 94.

The question raised in the appellee's brief, that the property cost more than $2000 at the time of its purchase, and when dedicated as a homestead—the city homestead being limited to $2000 at the time the contract was made—we think is of no force in this case, because the form of this suit is such as not to reach the collection of the debt against the estate of Edward Malone. This suit is for the foreclosure of the vendor's lien on the property occupied as a homestead. There is no vendor's lien secured in the contract, and no cause of action, therefore, exists against Mrs. Malone.

The judgment must be reversed and the cause remanded.

REVERSED AND REMANDED.

HARRIET W. BENTINCK V. JOSEPH FRANKLIN AND GALVESTON CITY COMPANY.

1. Statutes of limitation have reference to the remedy, and do not, in any sense, confer a vested right.
2. It was competent for the people, in adopting their organic law, to declare a suspension of the statute of limitation.
3. Land laws conferring title by prescription are statutes of limitation, and come within the principle of the 43d Section of 12th Article of the Constitution.
4. There is no law prohibiting champerty in force in this State.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

Joseph Franklin, appellee, brought this suit of trespass

to try title against Henry W. Bentinck, April, 1870, for the recovery of certain lots in the city of Galveston.

The defendant pleaded "not guilty," limitations of five years under deed duly registered, and of ten years, both exclusive of the period between January 28, 1861, and September 2, 1866; also ten years non-entry, and outstanding title.

Defendant afterwards pleaded "that the title of plaintiff was wholly derived from the Galveston City Company, which rested wholly upon proceedings had in case No. 96; that twenty years ago the defendant, with a full knowledge of all the facts affecting the validity of the proceedings in said suit, admitted that all the proceedings in and under said suit, so far as they affected the title to the property in controversy, were void; that said company did then, upon mature deliberation, with advice of counsel, determine not to claim said lots under said proceedings, and dropped the same from its property rolls and refused to pay taxes thereon. That by the admissions of said company, and their uniform course of conduct relative to said property, defendant and those under whom she claims were led to believe that the said company neither had nor pretended to have any claim whatever to said lots, and did so verily believe; that she was induced by such admissions and conduct by said company innocently to act with reference to said property to her great damage, and to pay out and expend large sums of money in the regular payment of all taxes thereon for about twenty years, and in the erection of improvements. That the plaintiff had full knowledge of all of these facts before and at the time of his pretended purchase; that he was not an innocent purchaser, but on the contrary, he had never paid any part of the purchase money; that the agreement between plaintiff and said company was one of champerty, common barratry and maintenance; that it was by

them agreed that no part of said purchase money should be due and payable by the plaintiff, except as contingent upon their success in this cause, and that the price so agreed to be paid did not exceed one-third of the value of the property at the time of the pretended purchase.

Galveston City Company appeared, excepted to being made a party, demurred generally, and pleaded "not guilty."

There was an agreement of counsel admitting original title of Galveston City Company under Menard grant, and regular payment of all taxes by defendant Bentinck since his purchase at tax sale.

Pending the suit, Henry W. Bentinck, original defendant, died, and Harriet Bentinck, surviving wife and appellant, was made a party.

Upon the trial the defendant offered to prove by James P. Cole, stockholder and agent of the Galveston City Company, that plaintiff, having no interest in the property in controversy, had hunted up the supposed defect in the title of the defendant, and a supposed better title in said company, upon which this suit is founded, and had of his own motion approached said company and obtained from them a deed thereto, upon consideration that he would institute and prosecute, at his own costs, suit for recovery thereof, and in event of success would pay to said company a part of its estimated value; which was objected to by counsel for plaintiff and Galveston City Company, on the ground that champerty was not obnoxious to the courts of Texas, and was ruled inadmissible by the court, on the ground, "that if champerty was obnoxious to our laws, proof of the facts relied on as constituting it could not be introduced under the general terms of champerty, maintenance and common barratry, but that said matters must be specially pleaded."

Defendant also offered to prove that the witness, the

general agent of the said company for sixteen years before the suit, had never rendered for taxes or paid taxes on the lots in controversy, nor had the company paid taxes thereon, or asserted claims thereto, until the making of the deed to plaintiff; that the Galveston City Company, twenty years before the institution of this suit, and with a full knowledge of the facts affecting their title to the property in controversy, ceased to claim the same, and openly disavowed title, and that defendant had been induced by the uniform conduct of said company and their declarations to act with respect to said property to her injury. All of which was objected to by counsel for plaintiff and said company, and excluded by the court.

This action of the court was assigned for error.

The plaintiff derived title through the Galveston City Company, who bought the property April 3, 1856, at sheriff's sale, under proceedings had in said suit No. 96. The City Company made their deed to plaintiff in 1870. On the nineteenth of February, 1855, defendant purchased the property at tax sale, and received tax deed therefor on the eighth day of May, 1856, which was duly recorded on same day, and had regularly paid all legal taxes on the property since that time, and openly claiming it as his own.

With respect to the use, cultivation and enjoyment of the property by defendant, the character of his improvements and their continuousness, there was much contradictory evidence between witnesses.

The only instruction given by the court was as follows: "The plaintiff must show title in himself. He has shown such title, and will be entitled to your verdict, unless defeated by defendant's plea of five years' limitations under deed duly registered, etc. If the jury believe from the evidence that the defendant had five years' peaceable possession of the premises in controversy, cultivating,

using, or enjoying the same, and paying taxes thereon, and claiming under a deed duly registered for a period of five years before the institution of this suit, and excluding in your computation so much of the time as is between the twenty-eighth of January, 1861, and the thirtieth of March, 1870, they will return a verdict for the defendant."

Verdict and judgment for plaintiff, from which defendant appealed.

Gould & Street, for appellant.—1. The court erred in the instructions given the jury.

The question raised involves two points; and first, does the twenty-fourth section of the twelfth article of the Constitution of 1869, by any necessary or proper construction, apply to a case where, before its adoption, the title to lands had been perfected under the existing laws? and second, if such be the construction necessarily arising from the terms of the provision, was it competent for the convention of 1869, with ratification by the vote of the people and the assent of Congress, so to provide?

Limitations with respect to lands, especially in this State, may become something more than statutes of limitation. In personal actions, the remedy is barred by the mere efflux of time; no affirmative acts are done or required to be done by the supposed debtor, and no right of action is vested in him. But with respect to lands it is different; affirmative acts of a claim of ownership, possession and use, cultivation or enjoyment, done and performed by the supposed defendant, are prerequisites to the moving of the statutes in his favor, and these, when continued for the prescribed duration of time, vests in him the ownership of the lands and invest him with his affirmative remedy, by means of which not merely to defend, but to assert his title. They are, therefore,

more than mere laws of limitation; they are laws of property, and have for their sanction higher principles of justice and more obvious reasons of policy. In the one case, without merit of the one party or demerit of the other, upon reasons of State merely, the debt is presumed to be paid; in the other, because of the failure of the one party through a series of years to pay the price of protection, viz., taxes, use, cultivation or enjoyment, the title of lands which he might have possessed is divested out of him and vested in the other party as the promised reward of his labor, and his toil, and his rendition to the government of its proper dues, continued for many years.

Statutes of limitation are said to be conclusive presumptives made by the law-making power, but the statute under which this defendant claims is ill-defined as a mere statute of presumption; it is only upon proof of acts done by him in conformity with the statutes that a presumption ever arises against his adversary, and upon such proof the laws of our land give him his action.

In Davidson v. Peticolas, 34 Texas, this court held that the statute requiring suit to first term of court to hold the drawer or endorser was not a statute of limitation, because an affirmative act was required of the holder.

In this case the defendant might, at any time between the second of September, 1866, and the thirtieth of March, 1870, have brought suit to quiet his title, and the title of the property would have been finally adjudged him by this court; but there was no requirement that he should sue; he was himself in possession, and there was no adverse claim, and under such circumstances it was against the policy of the law that he should sue. As this court observes in Bender v. Crawford, 33 Texas, 745, it is not incompetent for the Legislature, and, *a fortiori*, the Constitutional Convention, to vary the remedy, so that some substantial remedy be left; but if the provision un-

der consideration should be held applicable in this case, all remedy whatever is taken away from the possessor of the land. After the lapse of five years the Galveston City Company ceased to have any right in the property, and, *eo instante*, the *jus proprietatis* became annexed to the possessions of defendant, Bentinck, and an adequate remedy was given for the protection of the right. In the very words of the statute, defendant Bentinck "is to be held to have full title, precluding all claims."

This argument proceeds upon the hypothesis that if Article 4623, Paschal's Digest, is a law of property and not a mere statute of limitation, the constitutional provision will not be held applicable to it, and that in determining that question this court will be influenced by a proper regard for vested rights in private property, and incline to construe the provision, if it may reasonably be done, as not referring to such a case. (Cases cited by Cooley, page 365, notes 4, 5.)

With respect to the power of convention to interfere with vested rights. We do not understand the decision in Bender v. Crawford, 33 Texas, to have proceeded upon the ground that the mere defense which was taken away by Section 43 of the 12th Article of the Constitution was a vested right. Though there is an intimation in that case that the Convention, with the sanction of Congress and the approval of the people, might divest private rights in private property, yet the question is far too great a one to be considered as decided by a case in which it was not involved.

2. The court erred in excluding the evidence offered, and all evidence whatever, under the plea of champerty; in other words, striking out the plea without its having been excepted to, because the defense which it set up was not set out with what was deemed sufficient particularity and detail. The counsel, not having excepted to the plea,

on the trial objected to all evidence under it, on the ground that champerty was not known to our law; but the court declined to meet that question, and notwithstanding the numerous decisions of this court, and the uniform practice, uninvited either by exception or argument, ruled the matter insufficiently pleaded and in effect struck out the plea, thus by this extraordinary course cutting the defendant from all opportunity of amending the plea, which he would otherwise inevitably have had on a ruling upon exceptions. (10 Texas, 586; 9 Texas, 63; 27 Texas, 365.)

The common law not inconsistent with the statutes or public policy of this State, is the rule of decision in the courts of this State.

3. Champerty at common law is a substantive defense in civil actions. With what institutions or public policy of this State does that doctrine conflict? And, first, upon authority: The only cases where this question has been made which have heretofore come before this court are White v. Gay, 1 Texas, 384; McMullen v. Guest, 6 Texas, 275; Carder v. McDermott, 12 Texas, 553; Clarke v. Koehler, 32 Texas, 684.

White v. Gay arose under and was decided in conformity with the supposed rule of the civil law, which only prohibits contracts of this kind after the moving of the suit, or perhaps after litigation actually begun.

The decision, however, was pronounced after the introduction of the common law, and the court speak discursively of the rule under that system without the intimation of a doubt as to its obtainance here.

McMullen v. Guest was a case where the defendant, McMullen, attempted to defend himself by showing that the plaintiff, Guest, had entered into some collateral contract with a third party in no way connected with the cause and not a party to it, which, it was claimed, was

champertous. This was obviously a totally irrelevant issue, and was so held by the court. It is assumed throughout that case that the common law doctrine of champerty is in full force in its application to civil actions in this State; but in conclusion the court say that because unnecessary for the cause, they do not wish to be understood as having adjudged that question; and Hemphill, C. J., speaking for himself and, as he states, to invite discussion when the question should arise, intimates a doubt whether the public policy of this State in its early settlement would not mitigate the common law rule in a particular class of cases, to-wit, the perfecting of titles by agents or attorneys for an interest in the land.

Carder v. McDermott was a suit for land, and the defense that the plaintiff had purchased the land when in the adverse possession of defendant. After an able review of the questions presented, Hemphill, C. J., in conclusion, says: "I have not discussed the doctrines of champerty or maintenance in this opinion, for the reason that they do not properly arise in this case, and no opinion is intended to be given upon them." In Clarke v. Koehler, after verdict and judgment in the court below, a stranger to the cause having obtained an assignment of the interest of the party cast in the suit, gave notice of appeal in his own name, which this court noticing from the record, said: "This court has not and will not allow this kind of champertous speculations to obtain a footing in the courts of this State. The appeal is dismissed."

The result of these cases is, that the common law doctrine of champerty is recognized as obtaining in Texas, as qualified only by the doubt expressed in Carder v. McDermott, whether or not that doctrine should be considered as applicable here in cases where attorneys or agents in the early history of the State have perfected land titles upon agreements for an interest in the property. Here it

has been thought that perhaps a public policy, of which this court was judicially informed by reason of the history of the country, should qualify the old rule.

Have we so far advanced in virtue that we may now throw behind us the safeguards by which the law has heretofore protected the community "from those pests of civil society that are perpetually endeavoring to disturb the repose of their neighbors and officiously interfering in other men's quarrels?"

It is a sound maxim, good alike in morals and in law, "*Culpa est immiscere se rei ad se non pertinenti.*"

It will doubtless be argued that because we have not introduced the offense into our criminal code it is likewise abolished in our civil law. This inference is unwarranted by the premises. Are only those contracts against public policy in this State which have been declared punishable by our criminal law? True, no act punishable criminally can be the foundation of a civil right, but *non constat* that all acts not so punishable will sustain civil actions. There is no statute punishing champerty in Ohio, and the criminal laws of that State are all statutory. Yet, see Key v. Vattier, 1 Ham., 132; and in Iowa, Brordmorital v. Thompson, 30 Iowa, 500; and in Indiana, Lafferty v. Jelly, 22 Ind., 471; Cognillard v. Bearns, 21 Ind., 479; Scoby v. Forner, 13 Ind., 117; and in Alabama, Holloway v. Chenella, G. Pon., 488; and in Massachusetts, 9 Met., 489; 17 Mass., 257; see also, 4 Cons., 449; 4 Mich., 537; and upon the general doctrine, 4 Black., 135; 4 Rent., 449; 8 M. & N., 689; 2 Parsons on Contracts, 764, *et seq.;* 1 Story's Eq., 3, 294; 2 Story's Eq., 1048, and notes. If the welfare of the State is to be subordinated to any peculiar speculative or peculative disposition of individuals, that must needs be encouraged and afforded opportunity for expansion, then let the rule

that has perhaps come to be threadbare from constant application for centuries be abolished.

Ballinger, Jack & Mott, attorneys for appellees.—We submit, first, that the defendant's pleadings present no case of champerty; second, that if the contract was champertous, it was only so as between Franklin and the City Company, not affecting Franklin's title to the property; and, third, that there is no act of the Legislature of Texas, and no rule of law established by her courts, which defines such an offense as champerty at common law, or pronounces against the validity of contracts which might have been deemed champertous under the common law rule.

There is no such criminal offense under the laws of Texas. Her policy has been a different and more liberal one as to real estate, and the grounds of such policy are manifest.

The decisions of our Supreme Court upon this question seem to render argument superfluous. We refer to the following cases: Carder v. McDermott, 12 Texas, 546; McMullen v. Guest, 6 Texas, 283; White v. Gay, 1 Texas, 384.

As to contingent interest in the thing in suit, or its proceeds, see Butterworth v. Kinsey, 14 Texas, 495; Hill v. Cunningham, 25 Texas; *In re* Paschal, 10 Wallace, 495.

Appellant's counsel cite and rely upon the case of Clarke v. Koehler, 32 Texas, 31, in which this language is used by the court: "We have repeatedly decided that the original plaintiffs to an action cannot sell out their interest *pendente lite*, and make new plaintiffs to the suit. This court has not nor will it allow such kind of champertous speculation to maintain a footing in the courts of this State."

We have no dissent to express to this doctrine, but it

applies in no manner to the case at bar. The practice of selling out *pendente lite* is denounced by the court, and the expression, "champertous speculation," is used simply by the court as a term of reprehension. As well might it be said, in case the expression had been "odious speculation," that the court had decided that "speculation" is forbidden by the laws of this State.

"The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright, but they brought with them and adopted only that portion which was applicable to their situation."

"A custom which runs through the whole land is the common law." (Littleton.)

"A law is a just rule fitted to the existing state of things. It must alter as the state of things alters to which it relates." (Best, J.)

(Van Ness v. Packard, 2 Peters, 137; Wheaton v. Peters, 8 Peters, 591; Town of Paulet v. Clark, 9 Cranch, 292; Carson v. Blazer, 2 Binney, 384; Cates v. Waddington, 1 McCord, 580; Bullock v. Wilson, 2 Porter, 436.)

The courts of other States have pronounced upon this question, varying and abrogating the old English rule. (Fetrow v. Merriwether, 53 Ills., 275; Rowe v. Beckett, 30 Ind., 154; Hovey v. Hobson, 51 Maine, 62; Nichols v. Bunting, 3 Hawks (N. C.), 86; Moody v. Harper, 38 Miss., 599; Webb v. Camp, 26 Ga., 354; Danforth v. Streeter, 28 Vt., 490, 495; see decisions in Dillon v. Dougherty, 2 Grant's Cases (Penn.), 99; Whittemore v. Bean, 6 N. H., 50; Smith v. Smith, 11 N. H., 450; Poyas v. Wilkinson, 12 Rich. Law R., 428; Roberts v. Cooper, 20 How., 483; Hall's Lessee v. Ashley, 9 Hammond, 99; Wilson v. Merriwether, 53 Ills., 279; Wright v. Meek, 3 Green's Iowa R., 489; Lytle v. State, 17 Ark.)

The case of Newkirk v. Cone, 18 Illinois, 449, involving the question of champerty, reviews the whole field of discussion, and the opinion delivered by the court is able and clear. The court say:

"Undoubtedly the common law, and British statutes in aid thereof, as they stood at the period of the first settlement of the American colonies by British subjects, the year 1607, and adapted to our institutions and condition, are the law of this State so far as they remain unrepealed by statute. But our statutes have materially changed, if they have not wholly superseded, that law, in regard to maintenance and champerty. Our statutes dispense with livery of seizin in the conveyance of land, and enable any one claiming right to land, although out of possession, and although the same be in the adverse possession of another, to convey such interest as he may have therein, and give the purchaser the right to sue for the recovery of the land. If the law sanctions the sale by the party out of possession of the land held under adverse title by another, it necessarily sanctions the purchase of disputed titles, which require the aid of the law to make them available; and as necessarily sanctions the usual means of ascertaining their existence, and of judging of their validity by examination of the public records or land titles, and also the prosecution of actions in the courts for the recovery of the land. It cannot be said that the law authorizes a thing to be done, and at the same time denies the ordinary means of doing it."

The case of Mathewson v. Fitch, 22 California, 86, decided in 1863, turns upon this precise question. The language of the court, in its opinion, applying as well to Texas as to California, in the absence of a statutory rule, seems conclusive. The closing paragraph is in these words:

"There is no statute on the subject in this State, and we

have no doubt that the Legislature of 1850, when it adopted the statutes which were deemed necessary to organize the legal system of the State, by omitting to enact any such statute, acted in the spirit of the decisions which hold such laws inapplicable to this country, and with the direct purpose that there should be no law relating to the subject. In our judgment, in the absence of such statute, the offense of maintenance is unknown to the laws of this State."

These two cases, from Illinois and California, with the reasoning and authorities on which they are based, are respectfully referred to the court as irresistible and unanswerable upon the issue under discussion.

WALKER, J.—Joseph Franklin brought this suit against Henry W. Bentinck to recover certain lots in the city of Galveston. The defendant pleaded "not guilty;" also the ten and five years' statutes of limitations. He also set up title in himself under a purchase at tax sale, and likewise outstanding title.

It appears that the Galveston City Company, through which the plaintiff claims title, purchased the lots at judicial sale. This title is attacked, and the Galveston City Company is made a party. The errors assigned, on which we are asked to reverse this case, are five in number, viz.: "First—The court erred in the charge as given." "Second—The court erred in excluding the evidence offered under the defense of champerty." "Third—The court erred in excluding the evidence offered under the defense of estoppel." "Fourth—The court erred in excluding evidence under the defense of ten years' non-entry." "Fifth—The court erred in entering up judgment on the verdict."

The question raised by the first of these assignments has been settled by this court in Bender v. Crawford, 33

Texas, 745, and subsequent cases. We hold that statutes of limitation have reference to the remedy, and do not in any sense confer a vested right, and that it was perfectly competent for the people in adopting their organic law to declare the suspension of these statutes. It was done upon the maxim *inter arma leges silent.* We have also held that the land laws conferring title by prescription are statutes of limitation, and come within the principle of the 43d Section of the 12th Article of the Constitution. The second assignment of error is that most insisted on by counsel. Whether the law prohibiting champerty, or *campi partitir*, is to be regarded as a part of the common law, and in force in this State, is the question presented. The question has been before this court in White v. Gay, 1 Texas, 384; McMullen v. Guest, 6 Texas, 275; and Carder v. McDermott, 12 Texas, 553; and it is also claimed that the court passed upon the question in Clarke v. Koehler, in 32 Texas, 684. In the latter case the question of champerty was not before us on the pleadings in the case; the court simply disapprobating the conduct of one of the parties, applied to it the term champerty, adjectively, without meaning to be understood as applying the penalty of champerty to it, or holding that the law of champerty was actually in force. The law has not been recognized as in force in this State by any of the former decisions.

Whether the English statutes prohibiting common barratry, maintenance and champerty have ever come to be regarded as a part of the common law of England, even in that country, we think, is somewhat doubtful. They have certainly not been so considered by the courts of this country, unless in the State of New York, which would be regarded as an exception to the rule. The English statutes, if not in terms, have been in principle adopted by the Legislatures of some of the States; but

neither of the statutes passed in the reign of Edward I. nor Edward III., nor has that of 8 Elizabeth, c. 2; 12 George I., c. 29; nor 32 Henry VIII., c. 9, ever been adopted by the Legislature of Texas.

If, then, they have not become a part of the common law of England, they form no part of our system.

It is more than probable that the political power of our State has never regarded the principle contained in the English statutes as necessary or applicable to the condition of our people. A law which would prevent the officious intermeddling in the suits of others, in no way concerning parties so interfering, might be a salutary law in any State or community; but it cannot be denied that cases often present themselves to the profession in which a good man may do a service to humanity by espousing the cause of the weak against the strong.

The offense of common barratry is a species of immorality against which no law is necessary to warn the American profession.

The reasons which led to the enactment of 32 Henry VIII. do not exist in this country. In a country where all the lands embraced in what was once three kingdoms are owned by about eleven thousand persons, who form a strong landed aristocracy, such a statute as that of 32 Henry VIII. might serve to keep the land titles within these aristocratic limits; but in this country we have land for the millions; and if a lawyer helps his client to recover lands from the possession of another, and even takes a part of the land for his fee, if the right of his client is clear to the land, we are unable to see any immorality or breach of professional ethics in the transaction. Yet it would certainly be very wrong for attorneys to become mere jobbers and speculators, to hunt up rotten titles and ferment litigation.

Regarding the third, fourth and fifth errors assigned as not well taken, we affirm the judgment of the District Court.

AFFIRMED.

W. F. HOLLAND v. THE STATE OF TEXAS.

1. A second application for continuance by a defendant in a criminal cause on account of the absence of a witness residing in the county, who had attended in obedience to a subpœna at the former term, but for whom no attachment had been issued or applied for during the three days which had elapsed of the term at which the application is made, does not show due diligence.
2. On a second application for continuance by the accused, when the absence of the witness is stated in the affidavit to be on account of sickness, the character or effect of the disease should be stated in the affidavit, or set forth in an affidavit of the physician, or some other person.
3. It is proper for the court, in considering a motion for new trial based on alleged error in overruling an application for continuance, to consider the facts established on the trial, both with a view of determining the materiality of the facts which it was stated the absent witness would prove, and the truth of the affidavit.
4. The statement in an affidavit for continuance on account of the absence of a witness that the absent witness would "contradict and expose the witness A. B.," without stating how, is too vague and indefinite.
5. See this case for circumstantial evidence held sufficient to authorize a conviction for murder.
6. On a trial for murder a general verdict of "guilty," which does not find in terms the degree of murder, but assesses the punishment at hard labor in the penitentiary for life, is sufficient to support the judgment.

APPEAL from Erath. Tried below before the Hon. J. P. Osterhout.

Indictment of Frank Holland for the murder of John Hayes.

The conviction of the prisoner of murder in the first degree was obtained on circumstantial evidence alone.

In 1861 John Hayes married Mary, the daughter of Dr.

Statement of the case.

Wm. Edwards, of Erath county. A few weeks after the marriage Dr. Edwards received information that Hayes had a living wife in another State, and instituted prosecution. In default of bail, Hayes was committed to jail, escaped, and was not heard from for about eleven years. In 1872 he returned to Erath county.

On his return he found his wife had married again, with Frank Holland, and she and a son, the offspring of the first marriage, were living with Holland. Some negotiations took place, in which Hayes left it to the choice of the lady to return to him or remain with Holland. She chose the latter, and the affair was finally settled by an agreement that she should remain with Holland and Hayes should have his son.

In September, 1872, at the solicitation of Dr. Edwards, Hayes consented that his son, Jack, should go with his grandfather to visit his mother, with the understanding that the boy should return to him on the Sunday evening following.

At that time a camp-meeting was in progress under the direction of Dr. Edwards and near his house, and Sunday afternoon Hayes, Holland, his wife, the boy, Dr. Edwards, Joseph S. Edwards (a brother of Mrs. Holland), and others were there. Late in the afternoon Hayes proposed to leave, and wished to take his boy with him, which was objected to by Holland and J. S. Edwards, and "a fuss in words" ensued between the parties, which ended in an acquiescence on the part of Hayes to the boy remaining a few days longer, and he left, angry and declaring he would have his boy. He left the camp ground at from one and a half to two hours before sunset, and in fifteen to thirty minutes after Holland and J. S. Edwards left the camp, all going in the same direction—Hayes to his home at Waller's, and Holland and Edwards, with two others, ostensibly to the house of Edwards to attend to the cows

and calves; Holland riding a small unshod mare, Edwards a large chestnut-sorrel horse, shod before and unshod behind; Edwards wearing a black coat, Holland a brown. Of their companions, one (Henson) was mounted and the other (Vic. Edwards) on foot. After going some distance a separation occurred, Henson giving up his horse to Vic. Edwards and walking a nearer path. When he came into the road again he fell in with Vic. Edwards alone, who, in answer to his inquiry, told him that Holland and Edwards would be along after a while.

Holland and Edwards were next seen (one witness, who says he saw them at Jo. Edwards', being contradicted by Susan Edwards) about dusk, returning to the camp ground, their horses appearing tired, as if they had been going at speed. They were much excited, ate no supper, and used singular and suspicious language.

At about an hour by sun (as he states) a young man named Harper, at work in his father's field, a quarter or half mile from the spot where Hayes was found dead, heard the voice of a man exclaiming, "Oh! oh!" and immediately after a shot; saw a horse running, saddled, without a rider, and immediately after heard another shot; then saw on horseback a man in dark clothes, through an open spot in the timber towards the creek, and soon after two men on horseback, on the other side of the creek, going into the timber. He told his father what had occurred, and they went together to the spot where he heard the last shot, and there found Hayes dead.

When defendants returned to the camp Dr. Edwards went to them and they conversed awhile together privately.

During the following night information was received by J. B. Waller, with whom Hayes resided (and whose house was beyond Edwards' from the camp ground), that Hayes had been found dead near the road to the camp ground. Early the next morning he went to the place, and found

him four miles from the camp ground, shot through the head, as had been reported to him. With a view of ascertaining as much as possible in regard to the homicide, he examined for horse tracks. He found a number of tracks going towards the camp ground, and three, apparently recent, coming from it. He found one the track of a pony of his own, which he had lent to Hayes. Her track was familiar to him, and he followed it back. He discovered that (as indicated by the tracks) the pony had been running for a short distance along the road, and from where she quit the road to where deceased was found, but beyond that, towards the camp ground, the gait appeared to have been leisurely. Accompanying the track of the pony were, on either side, the tracks of a horse—one a large horse, with two shod and two unshod feet, and the other a smaller barefooted animal; and their tracks showed clearly the gait of these two, as far as he traced them, to have been a gallop. He followed these tracks backward, in the direction of the camp ground, to within half or three-quarters of a mile of that spot, and no further.

Complaint having been made, Holland and Jo. Edwards were arrested the next day by warrant of a justice; and on being arrested they surrendered each a pistol, one of which had one empty barrel; in the other, one barrel, which had been recently discharged, was newly reloaded.

The prisoner's second application for continuance was overruled; its character may be ascertained from the opinion.

On the same day the prisoner applied for a change of venue on account of prejudice, in the terms of the statute, supported by the affidavits of five citizens of the county. Counter-affidavits were filed by seven citizens, all of whom stated that one of the five who had made affidavit for the prisoner was not a respectable citizen of the county.

The motion for change of venue was overruled.

The following verdict was returned on the trial: "We, the jury, find the defendant guilty, and assess his punishment at hard labor in the penitentiary for life."

Wm. H. Lessing, for appellant.

Brown, for the State.

OGDEN, P. J.—It is claimed for the appellant in this case that the court below erred in overruling his motion for a continuance, and for which error the judgment should be reversed.

When a motion for a continuance on the first or second application fully complies with the law, and sets forth a meritorious ground, the party making the same is entitled, as a matter of law, to have his motion prevail. In a criminal case, where the application is made for the want of a witness, there are two requisites which the application must contain, and which calls forth the exercise of judicial discretion, viz., the diligence which has been used to procure the attendance of the witness, and the materiality of the testimony sought. Upon these prescribed requisites the court should exercise a sound legal discretion, and grant or refuse a continuance, according as the facts stated and the law require. Upon a second or any subsequent application it becomes the duty of the court to examine critically every fact relied upon, and to regard with disfavor every manifest attempt at imposition or delay.

The application for a continuance in this case was based upon the want of the testimony of Susan Edwards and M. J. Edwards; but Susan Edwards subsequently appeared and testified for defendant on the trial, so that the action of this court must depend upon the ruling of the court below, in regard to the absent witness, M. J. Ed-

wards; and the first inquiry is, does the affidavit show due diligence to procure the attendance of said witness? She was duly subpœnaed in November, 1872, and was in attendance on the court at its February term, but failed to appear at the May term. She is a resident of Erath county, and, under ordinary circumstances, her presence could have been enforced in a few hours. Her failure to appear on the first day of the term entitled the party to an attachment; and yet three days were allowed to pass without any effort to procure her attendance. This fact itself, we think, shows a sufficient want of diligence to authorize the court to exercise its judicial discretion; and in view of all the surrounding circumstances to grant or refuse the application, as justice might appear to require.

But the affidavit states that M. J. Edwards is sick and unable to attend court. We think this statement of the defendant below alone would rather tend to cast suspicion upon the application. It shows very recent communication with the witness, as he swears to her present physical condition, but fails to state the character of the disease, or whether he was capable of judging in regard to the character or extent of any disease. Had his application been accompanied with an affidavit of the witness' physician, or other person capable of judging of the character or effect of diseases, or from herself, that would have relieved the statement from the suspicion which now envelopes it, and doubtless caused the court to disregard it.

The facts which the appellant proposed to prove by the witness, M. J. Edwards, when the application for a continuance was first presented, might have been considered sufficient to entitle the affiant to a grant of his motion; but the subsequent trial demonstrated to a great extent their immateriality; and the court below, in considering the motion for a new trial, should have considered them

in the light of all the facts adduced upon that trial. And this court, in determining the merits of this appeal, may be authorized in comparing the affidavit with a proven history of the case.

It is stated in the affidavit for a continuance that the facts proposed to be proven by M. J. Edwards, cannot be obtained from any other source; whereas, nearly all the material facts sought to be proven by her were proven on the trial by one or more witnesses. The distance from the camp ground to where Hayes was killed, the time which elapsed between the leaving of the camp ground of Hayes and appellant, how long he was absent and when he returned, and whether he was armed or not, were facts testified to by several witnesses; and the statement of the opinion of M. J. Edwards could have made no material difference in the question of guilt or innocence.

The statement that M. J. Edwards would contradict and expose the witness, Henry Henson, without stating how, when or where, is too vague and indefinite to require further notice. In view of these facts, we think the court did not err in overruling the motion for a continuance, and the motion for a new trial upon the same grounds. We think the court did not err in the exercise of its legal discretion in refusing a change of venue. In the case of Cotton v. The State, 32 Texas, 614, that question was so ably and thoroughly considered that we deem it necessary only to refer to that case for the settlement of the question raised in this.

The appellant, in connection with another, was charged with the deliberate and premeditated murder of Hayes, and the whole proof tends to establish that crime, if it establishes anything. The only defense set up by appellant was an *alibi;* he thereby tacitly admitted that if guilty at all, he is guilty of murder in the first degree; and in view of the charge alleged in the indictment, and

the proof upon the trial, the court instructed the jury that, "If the jury believe from the evidence that the defendant and J. Edwards, acting together, coolly, deliberately and with a sedate mind and formed design to kill Hayes, followed him and shot him with a pistol, from which pistol shot Hayes died, then you will find the defendant guilty of murder in the first degree." In this very brief but comprehensive charge the court gave the jury to clearly understand all that was necessary for them to know in regard to what is murder in the first degree, and what is express malice, and no other instruction on those points was required, and none other should have been given. The instruction in this case is quite similar in that respect to the one given in Poe and Robinson v. The State, 32 Texas, 65, and which this court very justly commended in the highest terms.

The verdict of the jury, as was said by Justice Roberts in Slaughter v. The State, 24 Texas, 410, is a literal compliance with Article 626, Criminal Procedure—3090, Paschal's Digest. The appellant was charged with murder in the first degree, and the jury found him "guilty," and assessed the punishment prescribed for that offense. There can be no doubt or ambiguity in the verdict, and it is fully sufficient to support the judgment rendered. If, as in Slaughter v. The State, the jury had found the defendant guilty in general terms, and then had assessed the punishment for a lower degree of homicide, their verdict would then have been irregular and ambiguous, and in disregard of Article 3095, Paschal's Digest; but such was not the fact, and we think the verdict sufficient under the statute and decisions.

It is further claimed for the appellant that the verdict and judgment is unsupported by the evidence, and that the judgment should be reversed for that reason. It is true that this case is dependent mainly upon circumstan-

tial evidence, which should be criticised with great caution by courts and juries before permitting such evidence to be the foundation of a judgment against a fellow-creature, and especially when the charge is of so grave a character as the one presented in this record. But it is also true that the court and jury before whom a case is originally tried have greatly superior advantages for weighing those circumstances, and the means by which they are established, to an appellate court who must look to an imperfect record for all their information; and therefore the law has made the juries the exclusive judges of the facts in all criminal cases, and the oft-repeated decisions of this court have established the rule in this State, that a judgment in a criminal case will rarely be disturbed by this court upon the facts of a case, where there is any evidence to support the judgment.

As there is another party to be tried for the same offense and upon the same state of facts, we refrain from any comment upon the evidence in this case, further than to say that the appellant has been tried by a jury of his country, under apparent impartial circumstances. The law has been administered by the court with great care and ability. And now, after a careful review of all the facts presented by the record, we are forced to the conclusion that the judgment of the lower court should not be disturbed; it is therefore affirmed.

AFFIRMED.

38 482
28a 501
38 482
37a 609

JAMES H. BROWN v. THE STATE OF TEXAS.

1. Where the court is satisfied that a defendant who is taken sick during his trial on a charge of felony is too unwell to be present in court at every stage of the trial, the cause should either be temporarily continued, to await his convalescence, or a juror withdrawn and the cause continued.

Statement of the case.

2. On a trial for felony, no separation of the jury can be allowed, under Article 3070, Paschal's Digest, except with the consent of the party on trial; it is not within the power of his attorney to give such consent.
3. When such separation takes place, every juror should be under the control of an officer, that no communication may be had with other persons in regard to the cause on trial.
4. In a capital case, this court will ascertain whether there has been any violation of Article 3059, Paschal's Digest, though no exception may have been taken on the trial.
5. There may be other adequate causes, which will reduce a homicide from murder to manslaughter, beside the four provoking causes enumerated in Article 2254, Paschal's Digest.
6. On a trial for murder, where there is evidence of malpractice on the part of the surgeon who attended the deceased, the jury should be instructed that they cannot convict of murder, unless satisfied that the death resulted from the wound, and not from the malpractice of the surgeon.

APPEAL from Fort Bend. Tried below before the Hon. L. Lindsay.

The appellant was indicted for the murder of one Ted. Benjamin. The evidence shows that when appellant shot Benjamin, the latter was advancing upon him in an excited and angry manner, swearing he would have his revenge, and denouncing Brown as "a d—d rebel son-of-a-b—h." No weapon was in the hands of deceased, but an ax and handspike were within his reach when he was wounded by a pistol shot from appellant. The shot entered the lower part of the abdomen and passed through his body. The attending surgeon (?) sewed up the wound on one side of the body, and closed it with adhesive plaster on the other. Benjamin died in seven hours.

On the trial, the attorneys for the State and accused consented to the separation of the jury from the adjournment at night until next morning, the accused not consenting, he being in an adjoining room sick, having been removed by the instruction of his attending doctor during the argument.

The court consented that the jury might separate under

the charge of officers of the court, and they were taken to different rooms under different officers, six jurors being under a deputy sheriff, five colored jurors in an adjoining room under two bailiffs, and one white juror at his own house, under an officer. When the court asked the accused why the sentence of the law should not be passed upon him, or if he had anything to say, he answered, "that he did not consent to the jury separating; that he was sick in an adjoining room; and that he desired an appeal to the Supreme Court."

The court refused to charge the jury, on the application of appellant's counsel, that they could not find the prisoner guilty of murder unless they were satisfied that Benjamin died from the wound, and not from the malpractice of the surgeon.

It appears that from the beginning of the argument up to and including the return of the verdict and the charge of the court and the action of the court and counsel in regard to the separation of the jury, the trial was conducted in the absence of the accused.

Among other charges the court gave the following: "The only adequate causes fixed by our law to reduce the act of killing from murder to manslaughter are an assault and battery;" reciting and quoting the four adequate causes named in the Code (Art. 2254, Pas. Dig.), and proceeding: "These are all the causes which our law allows as adequate causes to reduce the killing of a human being from murder to manslaughter. If any one of these causes is found to exist, from the testimony, then the crime would be simple manslaughter. In the absence of all of them the crime is murder, of the first or second degree, as the jury may determine from the evidence."

There was a verdict and judgment of guilty of murder in the second degree, and assessing the punishment of appellant at five years imprisonment in the penitentiary.

P. E. Pearson, for appellant.

Attorney-General, for the State.

WALKER, J.—There is some novelty in this case.

Where a defendant in a prosecution for felony is taken ill on the trial, and the court is satisfied, by the opinions of physicians or otherwise, that he is too ill to be present in open court at every stage of the trial, the cause should either be temporarily continued to await his convalescence, or a juror should be withdrawn and the cause continued for the term. The accused should not only be within the walls of the court house, but he should be present where the trial is conducted, that he may see and be seen, hear and be heard, under such regulations as the law has established.

Under our Code of Criminal Procedure it is competent, on the trial of a felony, for counsel to do certain things in the presence of the defendant, but these things strictly pertain to professional acts; but that article of our code (3070, Paschal's Digest) which provides that a jury may be allowed to separate, by consent, in charge of an officer, limits the consent to the defendant alone, so far as he is concerned. It is not an act, either by practice or by our code, brought within the province of counsel. Had the prisoner consented to the separation of the jury contemplated by the statute, he would not be bound in this case, for the separation which took place was not such as is contemplated by the law. When a separation takes place by the consent of the accused, every juror should be under the protection and control of an officer, that no communication may be had with other persons in any wise touching the cause on trial. It is the practice of the courts to permit a juror to retire from the panel for a temporary or necessary cause, and this practice grows out of necessity; but the court should be watchful and

vigilant to see that the law is executed which forbids all improper conduct on the part of jurors, and all intermeddling or tampering with them by parties interested in the suit, their friends, or other persons.

Exception is taken to the charge of the court in the assignment of errors; but no special exception was taken on the trial; yet in a felony case it has been the practice of this court to examine the general charge in order to determine whether the accused has been fairly tried. (Villareal v. The State, 26 Texas, 107; and 23 Texas, 557; 27 Texas, 146, 438, 765; 28 Texas, 711; 29 Texas, 500; 31 Texas, 608, 575; 30 Texas, 472; 33 Texas, 660.)

The court will not, however, in cases of misdemeanor, reverse a judgment on account of the insufficiency or error of the general charge, unless an exception be taken on the trial. (24 Texas, 154.) In such cases a written charge is not required by the District Court, but in capital cases the court will look at any violation of Article 3059, Paschal's Digest. The charge of the court in this case may have misled the jury. There was no evidence of threats made on condition that the deceased should first be assailed, and the presentation of this question to the minds of the jurors may have led them into an erroneous conception of what the evidence in the case really was. It was error to instruct the jury on the law of adequate cause, which would reduce murder to manslaughter, that the four provoking causes enumerated in Article 2254 were the only causes which could reduce murder to manslaughter. The maxim, *expresio unius est exclusio alterins*, cannot apply to Article 2254. By Article 2252 the Legislature has defined the words "adequate cause." By the expression "adequate cause" is meant such as would commonly produce a degree of anger, rage, resentment, or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. It

is unfortunate that bad and vicious men can and do find many more means of outraging and insulting others of ordinary temper than those four enumerated in Article 2254. The language employed by the deceased was grossly profane, vulgar and abusive. It was applied to the appellant in the presence of his friends and neighbors; it was such language as in most instances, if applied to men of ordinary temper, was calculated to produce anger, rage and resentment.

It was error in the court under our law (Arts. 2203 and 2204, Paschal's Digest) to refuse giving the charge as asked, concerning the treatment of the wound by the physician, from which the deceased is supposed to have come to his death. Our law undoubtedly changes the rule of the common law, the theory of which was that he who caused the first injury should be held guilty, upon the theory that without the first injury no other would have followed, as resulting from the first.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

JAMES H. CANNON, ADMR. OF JOHN T. DECHARD, AND HARRIET DECHARD, WIDOW, v. R. M. BONNER, FOR USE OF W. M. MCDANIEL AND B. W. JACKSON.

1 When the vendor of land takes personal security other than the bill or note of the vendee for the purchase money, he is held to have abandoned his vendor's lien.

2. A mortgage made by the vendee who has given such other personal security to secure the purchase money, is construed only as a mortgage and not as evidence of the vendor's lien; and if not signed and acknowledged by the wife, does not subject the land to the debt as against the homestead rights of the wife.

3. The allowance and approval of a note by the Probate Court, as a claim against an estate, is a *quasi* judgment, and can only be attacked as other judgments.
4. The action of the Probate Court setting aside a homestead is conclusive except when directly attacked.

APPEAL from Anderson. Tried below before the Hon. John G. Scott.

This was a suit to enforce a mortgage. The relation of the several parties to the transaction appears in the complicated record, the outlines of which are as follows:

On twenty-seventh of November, 1861, John T. Dechard as principal, and W. Y. Lacy and John G. Stuart as sureties, executed three notes to Isaac S. Taylor, each for $833, due, respectively, in one, two and three years, with interest. These notes were for part consideration for 214 acres of land sold by Taylor to Dechard, and for which Taylor executed a deed in fee to Dechard on the date of said notes. At the same time Dechard executed to Taylor a mortgage upon the same land to secure the said balance of purchase money. In the mortgage Mrs. Harriet Dechard, wife of John T. Dechard, did not join. The land subsequently became the homestead of Dechard and wife.

Taylor and wife assigned the notes to R. M. Bonner and guarantied their payment.

John T. Dechard died June, 1866; James H. Cannon (appellant) became administrator, and October 6, 1866, allowed said notes; his action appears to have been approved by the probate court.

October 6, 1866, R. M. Bonner, for use of W. M. McDaniel and B. W. Jackson, brought suit on said notes and obtained judgment at the November Term of the District Court of Anderson county against Stuart & Lacy, the sureties of Dechard, and against Taylor and wife, endorsers of the said notes.

In March, 1868, R. M. Bonner, for use of McDaniel and

Argument for the appellant.

Jackson, brought this suit in the District Court of Anderson county against all the parties to said transaction of November 27, 1861, viz.: against Cannon, administrator of Dechard; Stuart & Lacy, sureties; and against Taylor and wife.

The petition gives a statement of the facts—the former suit—that the personal judgment is ineffectual; that the notes, deed and mortgage, executed at the same time, were parts of the same transaction; that at the institution of the former suit plaintiffs did not know of the existence of the mortgage; that plaintiffs, being holders of the notes, were entitled to all securities therefor, and asking decree subjecting the land to sale to satisfy the judgment so obtained upon the said notes.

The widow of John T. Dechard, Mrs. Harriet Dechard, intervened, claiming that the land had been set apart to her as a homestead; that the same had been the homestead of her husband and family at his death, and had not been abandoned.

The facts above appeared on the trial, but the court excluded a transcript of proceedings in the probate court, setting the land apart to the intervenor and her children as a homestead.

Judgment for plaintiffs for the amount due, and for sale of the land, from which Cannon, the administrator of Dechard, and Harriet Dechard, widow, appealed.

T. G. Gammage, attorney for appellant, cited Giddings v. Crosby, 24 Texas, 295; Paschal's Digest, Articles 1319, 3716; Robertson v. Paul, 16 Texas, 472; Buchanan v. Monroe, 22 Texas, 542; Cundiff v. Simpson, 32 Texas, 145; Butler v. Dunagan, 19 Texas, 556; Crayton v. Munger, 11 Texas, 234; Hooper v. Hall, 20 Texas, 159; Wright v. Donnell, 34 Texas, 291; Graham v. Vining, 1 Texas, 639; Danzey v. Sweeney, 7 Texas, 625; Crosby v.

McWillie, 11 Texas, 94; Wright v. Henderson, 12 Texas, 43; Parker County v. Sewell, 24 Texas, 239; Gillman v. Brown, 1 Mason, 212; Nairne v. Prouse, 6 Vesey, 752; 4 Kent, 171; Rogers v. Green, 35 Texas, 730.

T. J. Word, attorney for appellee, cited Howard v. Davis, 6 Texas, 174; Withers v. Patterson, 27 Texas, 491; 1 Story's Eq., §§ 567, 635, 638; 2 Story's Eq., § 1226; Sprigg v. Bank of Mt. Pleasant, 10 Peters, 265; Baker v. Clepper, 26 Texas, 629; Wallis v. Beauchamp, 15 Texas, 303; Hooper v. Brinson, 10 Texas, 296.

WALKER, J.—In 1861 John T. Dechard purchased a tract of land in Anderson county from I. S. Taylor, giving at the same time three promissory notes for $833.33 each, due in one, two and three years, with William Y. Lacy and John G. Stuart as securities. Taylor executed and delivered a deed to Dechard for the land, and at the same time Dechard executed a mortgage to secure the purchase money; his wife, Harriet, not joining in the mortgage. In 1862 Taylor assigned these notes to R. M. Bonner, and in October, 1864, Mrs. Taylor, acting for herself and her husband, he being absent in the Confederate army, signed both their names as guarantors of the notes to Bonner.

John T. Dechard died in 1866, and the appellant, James H. Cannon, administered on his estate. The notes were presented to the administrator, allowed, and the allowance approved by the probate court. In October, 1866, Bonner brought suit against the securities and guarantors upon the note. Judgment went against the defendants. On the second of March, 1868, Bonner, McDaniel and Jackson sued Cannon, the administrator of Dechard, Lacy, Stuart and the Taylors. Mrs. Harriet M. Dechard intervened and claimed her homestead rights.

The principle is familiar that where the vendor of land takes personal security from the vendee for the purchase money he is held to have abandoned his vendor's lien. This property was not then encumbered by the vendor's lien, and the mortgage to secure the purchase money, not being signed by Mrs. Dechard, stands upon no higher ground against her than a mortgage given to secure any other debt.

It is not necessary to discuss the errors assigned in their order.

The first error assigned is probably well taken; at the time this suit was brought the plaintiff should have gone into the probate court in order to enforce his lien. (Giddings v. Crosby, 24 Texas, 295.)

We pass over the second assignment of error.

As to the third, we think the exception comes too late. The presumptions are in favor of the action of the county court, and that that court had all the necessary proof before it of the genuineness and validity of the claim. We think the court erred in ruling out the records of the Probate Court of Anderson county, by the introduction of which it was sought to show that that court, having full jurisdiction to do so, had assigned to Mrs. Dechard a homestead of two hundred acres.

The probate court had jurisdiction of this matter, and in no way is it shown to us that it had transcended its jurisdiction. Its judgment was not appealed from; and where the jurisdiction is plain and no appeal is taken, the judgment is final, and cannot be collaterally impeached. It is scarcely necessary to refer to authorities in support of this opinion; but Graham v. Vining, 1 Texas, 639; Danzey v. Sweeney, 7 Texas, 625; Crosby v. McWillie *et al.*, 11 Texas, 94; Wright v. Henderson, 12 Texas, 43; and Robertson v. Paul, 16 Texas, 475, are all cases bearing in its support.

We are of opinion the judgment of the District Court should be reversed and the cause remanded, to be proceeded in, in accordance with this opinion.

REVERSED AND REMANDED.

J. W. TAUL v. B. H. EPPERSON.

1. The security upon an error-bond sued out by *one* of several joint defendants, paying the debt after the judgment had been affirmed, is subrogated to the rights of the plaintiffs as against *all* the defendants.
2. A judgment lien has priority over a purchaser of the homestead under a deed of trust signed and duly acknowledged by the husband and wife, for the same property.

APPEAL from Lamar. Tried below before the Hon. Winston Banks.

In 1867 appellant brought his action of trespass to try title against William B. Stout, to recover two tracts of land in Red River county. The land had been purchased by appellant at a sale made in 1866 by Ed. West, trustee, under deeds of trust, one executed by Stout, and the other by Stout and his wife, Mrs. M. C. Stout, in 1860.

Pending the suit, Stout died, and his administrator, W. W. Walker, was made party. In 1869, Mrs. M. C. Stout, widow, living on one of the tracts of land and claiming it as a homestead, was made a party defendant.

In 1868, B. H. Epperson obtained leave to intervene, and filed his petition alleging that he had a judgment lien upon the land sued for, by virtue of having, as surety for Stout on an appeal bond, paid a judgment that was a lien upon the lands.

The plaintiff demurred to the evidence of the intervenor, but no formal joinder in demurrer appears.

Argument for the appellant.

The jury found for the plaintiff against Walker, the administrator, and against the homestead claim of the widow, Mrs. M. C. Stout.

The judgment was in favor of plaintiff against the defendants; but, upon the demurrer, in favor of the intervenor and against the plaintiff.

From this judgment the plaintiff appealed.

The facts sufficiently appear in the opinion of the court.

Johnson & Miner, for appellant.—It is believed that the plain elementary principles of law support the position assumed by appellant.

"The *allegata* and *probata* must correspond." (Gammage v. Alexander, 14 Texas, 418.)

The proof must be according to the allegations of the parties, and if the proofs go beyond the allegations the court cannot judicially act upon them, as facts not stated cannot form the basis of a decree. (Harrison v. Nixon, 9 Peters, 483; Wright v. Wright, 3 Texas, 168; 13 Texas, 399.) No evidence not supported by the allegations sustains a verdict. (Mims v. Mitchell, 1 Texas, 443.)

Does the proof in this case correspond with the allegations? Were there any allegations by virtue of which the proof introduced became competent testimony to sustain the judgment?

The demurrer to the evidence offered authorized the court to render such a judgment, at the time, as the facts warranted. (Bradbury v. Reed, 23 Texas, 260.) It does not appear that the demurrer was acted upon at the time, and its admissions could not subsequently form the basis of a decree. (Chambers v. Miller, 9 Texas, 237.)

There was no issue of fact found in favor of intervenor by the jury, and the judgment in his favor is entirely unsupported by issue found, evidence corresponding to the

allegations, or admissions made by the plaintiff. (Chambers v. Miller, 9 Texas, 237.)

James H. Clark, also for appellant.

Walton & Green, for appellee, cited Henderson v. Kissum, 8 Texas, 46; Jordan v. Hudson, 11 Texas, 82; Sublett v. McKinney, 19 Texas, 438; Mitchell v. DeWitt, 25 Texas Sup., 180; Lampkin v. Mills, 4 Geo., 343; Henderson v. Burleson, 4 Texas, 49.

OGDEN, P. J.—In 1867 the appellant, J. W. Taul, brought this suit in trespass to try title to two certain tracts of land. Stout having died, his administrator, W. W. Walker, was made party. In 1869 Mrs. M. C. Stout, then living on one of the tracts of land as her homestead, was also made party defendant. At the same time B. H. Epperson intervened, claiming a judgment lien upon both tracts, prior in point of date to the title of plaintiff Taul. The cause was submitted to a jury, and a judgment was rendered in favor of the plaintiff, and against Mrs. Stout, but against the plaintiff as to the prior lien of the intervenor, and the plaintiff has appealed from that portion of the judgment in favor of the intervenor. Mrs. Stout not having appealed, we are required to examine only that portion of the judgment which relates to the claim of the appellant, Taul, and the intervenor, Epperson.

Appellant's title originated in two deeds executed in 1866 by E. West, trustee, to the two tracts of land in controversy.

The intervenor's claim originated in a judgment of the District Court, rendered in 1859, against B. W. Stout and one Harris. This judgment, on the day of its rendition, became a lien upon all the real estate of Stout and Harris situate in the county of Red River. There is no denial

that on the rendition of that judgment Stout was the owner of the two tracts of land, and that they were situated in the county of Red River; and therefore the lien attached to both of these tracts, and has continued to the present time, unless the judgment has been paid or allowed to become dormant.

Two executions were issued on the judgment in 1859, and in the latter part of that year a writ of error and *supersedeas* was sued out by one of the judgment debtors, Harris, and the intervenor, Epperson, and Hawley, became securities on the writ of error bond.

It is true that Stout did not join in suing out the writ of error, but he was, nevertheless, bound for the judgment should it be affirmed by the Supreme Court, and his land was liable for its satisfaction as fully as though he had sued out the writ of error, especially since he never complained of the judgment of the District Court, nor the lien which attached to his land.

In 1860 the judgment of the District Court was affirmed by the Supreme Court against Harris and Stout, and against the securities on the writ of error bond, Epperson and Hawley. This action of the Supreme Court affirmed the lien of the judgment of the District Court from the date of rendition; it also bound Epperson and Hawley for the same. Upon this judgment executions issued in 1860 and 1861, but the judgment remained unsatisfied until 1868, when another execution issued, and Epperson, the intervenor, paid off and satisfied the judgment. Up to the date of payment by Epperson that judgment had not been satisfied nor become dormant; and by the payment of the same Epperson became subrogated to all the rights of the original judgment creditor, who held a valid lien upon the lands of Harris and Stout in Red River county. These were matters of record in the county, and he who made a purchase of any such land after the

rendition of that original judgment in the District Court, is chargeable with notice of the same. As appellant's title bears date seven years after the lien under which the intervenor claims, his title must be held subject to the lien created by the judgment of 1859.

By signing the writ of error bond, Epperson and Hawley became liable to pay the debt, and thereby, in fact, became security for Harris and Stout; and events show that he paid the debt as much for Stout as for Harris, and thereby became entitled to all the rights against either or both which the original creditor held.

We see no error in the judgment of the lower court, and it is affirmed.

AFFIRMED.

E. B. WHEELOCK & Co. v. W. B. WRIGHT.

1. It is incompetent to prove the declarations of an agent in a suit against the principal, except such declarations be part of the transaction in controversy.
2. The improper admission of immaterial testimony is no cause of reversal.
3. Under the statute allowing parties to testify, it is not error to allow such testimony to be given by depositions.

APPEAL from Red River. Tried below before the Hon. A. H. Latimer.

The appellee brought suit by attachment against appellants for the proceeds of two certain drafts, in February, 1861, placed in the hands of one John L. Williams, a general agent of appellees. Williams signed a receipt for the drafts as agent for appellants; and plaintiff claimed that the drafts were collected by appellants.

The appellants denied the agency of Williams, denied that they ever received the drafts, and payment of the money due on them.

The testimony was contradictory. The plaintiff on the stand testified to the facts material to his case.

The depositions of Wheelock, appellant, were read, denying the agency of Williams to bind the firm, and testifying that the drafts had not been received or collected by them. The witness testifying after careful inspection of the books of the firm.

One John A. Peel, for plaintiff, testified that John S. Williams, in 1861, told witness that he had received two drafts for plaintiff for collection, and had forwarded them to the house of E. B. Wheelock & Co. This conversation was in the summer of 1861, and Williams said he had got the drafts in the winter or spring preceding; that it was customary for agents of mercantile houses in New Orleans, traveling through the country in their interests, to take drafts from parties through the country for collection, and the proceeds to be applied as directed by the parties, paid over to other parties or placed to their credit whenever directed. Witness has done so frequently, and considered his house bound for his acts.

Judgment for plaintiff, and appeal by E. B. Wheelock & Co.

Walton & Green, for appellants.—The judgment of the court below should be reversed, and a new trial ordered, because of the following errors:

I. The court erred in permitting the unsworn statements of John L. Williams to go to the jury as evidence in the case.

This error alone is of sufficient gravity, and is sufficiently prejudicial to the appellants, to demand the prompt reversal of the judgment.

The only instance in which the statements or admissions of an agent (even where the agency is admitted or proved beyond a doubt), can be introduced as against his

principal, is where the admissions or statements form part of the *res gestæ*. (Story on Agency, §§ 134 to 137.)

The declaration of Williams, in reference to the fact of his (Williams) having sent the drafts to Wheelock & Co., was made in the summer of 1861.

The transaction about which the dispute arises occurred February 1, 1861.

In Thalmeyer v. Brinkerhoff, 4 Wend., 394, Marcy, J., holds the law to be that "What he (the agent) said at another time, though it related to the same transaction, is not admissible testimony;" and this view has been expressly adopted as the law by this court, by Hemphill, J., in Bingham *et al.* v. Carr, 21 Texas, 147; and again spoken of as a "well recognized principle," in Lacoste v. Bexar County, 28 Texas, 424, in which case such evidence is denounced as "hearsay."

It is said by Chief Justice Tyndal in the case, Garth v. Howard, 8 Bing. R., 451, "It is dangerous to open the door to the declarations of agents, beyond what the cases have already done:" the tenor of the opinion being, after admitting the law as to their admissibility as part of the *res gestæ*, rather to deplore their admission on any terms, than to encourage them.

In the case before the court, this error of the court was peculiarly and fatally prejudicial to the rights of the appellants.

Without this declaration of the man Williams, the evidence is, to say the most, equally balanced.

True, the appellee swears to an admission on the part of appellants; but E. B. Wheelock, the partner by whom the admission is alleged to have been made, as positively denies any benefit derived or connection with the drafts; and it cannot but appear to this court that the probabilities are strong that this declaration on the part of the man who assumed to be, and was recognized as, the agent of

appellants, constitutes the preponderance of evidence which turned the scales against them.

Most certainly it is strongly coroborative of Wright's side of the contradictory allegations. It was admitted as evidence, and the jury were, under their oaths, bound to respect it as such.

The witnesses, Wright and Wheelock, stood on equal footing until it was introduced. The jury should have decided the cause without this evidence being before them. It was before them, and most unquestionably improperly before them, and for this reason the judgment should be reversed. In the charge of the court the judge says, in terms, "The statement of Williams whilst acting as agent of Wheelock & Co., is evidence against them."

II. The judgment is erroneous in holding appellants liable for the acts of another (Williams) when his agency for them is not proved.

Appellants deny the agency of Williams both in their sworn answer, and E. B. Wheelock swears in his testimony that Williams was not authorized at the time as the agent of E. B. Wheelock & Co., for any purpose.

As to proof of agency, where the authority is questioned by the principal, see Trustees, etc., v. Bledsoe, 5 Ind., 133; Mussy v. Beecher, 3 Cush., 517; Brigham v. Peters, 1 Gray, 145.

Hancock & West, for appellee, cited Story on Agency, Sec. 135; 4 Texas, 89, Edrington v. Kigler.

WALKER, J.—This case comes before us on the evidence mainly. It is true a bill of exceptions was taken long after the trial to the charges of the court, and an objection is urged to the admission of the evidence of John A. Teal. The evidence of this witness certainly could do the appellants no harm; it was rather in their favor, and though it

was really incompetent to go to the jury; as it was evidently more favorable to the appellants than to the appellees, it could do them no harm.

Certainly the fact that E. B. Wheelock's testimony was offered in the form of a deposition and not delivered in person to the jury forms no reason in the world for giving him a new trial. Wheelock's evidence went to the jury without cross-examination; the appellee was also a witness, and was cross-examined before a jury. Indeed, the jury, having all the evidence before them, as well as some of the witnesses, must be regarded as better judges of the facts than this court can be.

Finding no error in law requiring a reversal of the judgment by this court, it is affirmed.

AFFIRMED.

JACKSON R. MILLER ET AL. v. W. E. RICHARDSON ET AL.

1. A District Court has authority to enter *nunc pro tunc* an order of a former term, omitted from the minutes by mistake of the clerk.
2. There should be some memorandum in writing of such action among the papers of the cause, to authorize entry of such order or judgment of the former term.
3. The entry of the judge upon the motion docket at a former term is such memorandum as would authorize the entry of the same upon the minutes of a subsequent term.

ERROR from Henderson. Tried below before the Hon. John D. Scott.

On February 2, 1871, plaintiffs in error brought trespass to try title for certain lots in Athens, against the defendant in error, Richardson, whose warrantor, Warren, subsequently became party.

On July 12, 1871, there was a trial had, with verdict and judgment for plaintiffs.

Statement of the case.

The defendant, Richardson, on July 15, filed a motion for new trial.

The motion seems to have been heard and granted, the judge entering his action upon his docket. The order granting a new trial was not entered upon the minutes of the court.

A writ of possession issued, and on August 12 Richardson filed his bill for a new trial, obtaining an injunction against the writ of possession.

At the November term, 1871, the bill for new trial was dismissed.

Richardson, on the same day, filed a motion for a new trial, as follows:

"Now at this term of the court comes the defendant in the above entitled cause, and leave of the court being first had and obtained, files his motion to have an order granting him a new trial in said cause at the July term of said court entered upon the minutes of said court, *nunc pro tunc*. Defendant states that at the said term, to-wit, the July term of this court, the above cause was submitted to a jury, and that the jury returned into court a verdict against this defendant; that this defendant then and there, within the time prescribed by law, to-wit, July 15, 1871, filed his motion for a new trial in said cause, and that said motion for a new trial in said cause was heard and sustained by the court, and so entered upon the docket. Defendant further states that the clerk failed and neglected to enter up the decree granting him a new trial, as aforesaid. Premises considered, defendant moves the court to have said decree granting him a new trial, as aforesaid, entered up on the minutes *nunc pro tunc*, and that said cause may stand for trial as if said decree had been properly entered at the July term of this court."

This motion was granted by the court, the order recit-

ing "that it appearing to the satisfaction of the court that the court, at the last term, had granted a new trial in this case, on the consideration of the motion made at the last term for that purpose, and that the judgment of the court so granting a new trial had not been entered at that term by mistake and omission."

At a subsequent day of the term the case was called for trial, the plaintiff declining to participate. Judgment was rendered for defendant in error, Richardson, for the property in controversy.

Miller & Miller prosecute their writ of error.

Thomas B. Greenwood, attorney for appellants, cited Goss v. McLauren, 17 Texas, 114; Merle v. Anderson, 4 Texas, 200.

T. J. Word, for appellees.

OGDEN, P. J.—The material question presented for decision in this record is, has the District Court authority to enter *nunc pro tunc*, at a subsequent term, any order or judgment of that court made at a former term, but which, through the mistake of the clerk, or other person, was not spread upon the minutes of the court, and made a part of the record? Articles 49, 51 and 1245, Paschal's Digest, appear to have been passed expressly to confer such authority upon the district courts, and this court in McKay v. Speak, 8 Texas, 376, and in Swift v. Faris, 11 Texas, 18, clearly recognizes the authority conferred by statute. In Hagler v. Mercer, 6 Florida, 721, it is said, "The entry of the judgment *nunc pro tunc* is always proper when a judgment has been ordered by the court, but the clerk has failed or neglected to copy it into the record."

Under the statute and decisions there must be some memorandum in writing among the papers of the cause to

authorize the entry of such order or judgment; and in the case at bar there was a memorandum in the motion docket, opposite the motion for a new trial, that the motion was sustained. This memorandum is supposed to have been made by the presiding judge; and from the order and judgment entered at the subsequent term, there can be no doubt that the new trial was awarded at the previous term, but, by mistake, was not entered. In Young v. Braxson, 23 Ala., 364, it is said that the memoranda entered by the judge upon the motion docket are competent evidence to show the action of the court; we are therefore clearly of the opinion that the court was fully authorized to enter the order *nunc pro tunc* complained of in this cause. But it is claimed in the assignment of errors that the appellants had no legal notice of the motion for that purpose as required by law, and that therefore the order was a nullity. There was notice by the service of the original bill, which contained the motion subsequently acted upon by the court; and though the transcript does not inform us of the date of the action of the court, in the dissolution of the injunction, yet we think it fair to presume that the action on the motion to enter the order granting a new trial, and the motion to dismiss the original bill for a new trial, were had at the same time, since the court could hardly have granted the one without having overruled the other in the same order.

There are no bills of exceptions, and no statement of facts. The record before us is quite imperfect, and we are warranted in presuming in favor of the legality of the action of the court until the contrary appears.

And being unable to discover any such error in the action of the lower court, as would require a reversal of the judgment, it is affirmed.

AFFIRMED.

JACK BULLARD v. THE STATE OF TEXAS.

1. No legal verdict can be rendered in a criminal cause by a jury composed of more than twelve men.
2. If a jury of more than twelve has been impanneled, and the last juror sworn can be pointed out during the trial, he may be dismissed from the panel and the trial proceed.

APPEAL from Ellis. Tried below before the Hon. Hardin Hart.

Attorney-General, for the State.

WALKER, J.—We need notice but one of the errors assigned for reversing this case.

The appellant was indicted for horse stealing in the District Court of Ellis county, and tried before a jury of thirteen men, convicted, and adjudged to suffer imprisonment in the penitentiary for the term of ten years. This is certainly a very novel irregularity in a Texas court. Article 3007, Paschal's Digest, declares "that the only mode of trial upon issues of fact in the Disirict Court is by a jury of *twelve men*, except in certain cases otherwise provided for."

Similar cases have seldom occurred, but when they have occurred the courts in England and in the different States have expressed a diversity of opinion. In Mississippi a verdict of thirteen jurors was set aside. (Wolf *et al.* v. Martin, 1 How., 30.) In Tileman *et al.* v. Ailles, 5 Smedes & Marsh., 378, the court refused to allow it as error, that the verdict was rendered by thirteen jurors, but state that if it had been rendered by a less number than twelve it would be void. In Kentucky the court held that the defendant being present, and not objecting when the jury was sworn, could not maintain it as error

that the verdict was rendered by thirteen jurors. (5 B. Mon., 120. In Ross v. Neal, 7 Minn., 407, the court held the verdict void, if excepted to in the court below.

The English courts have allowed the last juror sworn to be discharged from the panel, and the trial to proceed, where the mistake is discovered before the jury retired to deliberate. But we think, under our law, there is no room for the courts to speculate upon such irregularity. If the fact is discovered before the verdict is rendered, the cause should be withdrawn from the jury, and a lawful jury impanneled and sworn to try it; or, if the last juror sworn can be pointed out, he may be dismissed from the panel, and the trial proceed before the legally constituted jury. But if more jurors than the legal number are permitted to deliberate on the verdict, the verdict should be set aside and a new trial awarded.

The judgment in this case is reversed and the cause remanded.

REVERSED AND REMANDED.

ALBERT FULCHER v. THE STATE OF TEXAS.

1. Appeal does not lie from the action of the District Court in overruling a motion for new trial in a criminal case.
2. In this case the jury found the defendant guilty of rape; thereupon the court remanded the defendant to jail to await sentence. A motion for new trial was overruled, and an appeal taken. *Held*, that the Supreme Court had no jurisdiction on appeal.
3. Hoppe v. The State, in 32 Texas, overruled.

APPEAL from Bastrop. Tried below before the Hon. J. P. Richardson.

The defendant was found guilty of rape. Upon the return of the verdict, it was ordered by the court that the

defendant, Albert Fulcher, be remanded to the county jail, there to await judgment and sentence.

A motion for new trial was overruled, the record showing, "It is ordered by the court that said motion be and the same is hereby overruled, to which ruling of the court the defendant did then and there except, and gave notice in open court of appeal to the Supreme Court of Texas."

Jones & Sayers, for appellant.

Attorney-General, for the State.

MCADOO, J.—No judgment was rendered on the verdict of the jury in the court below, in this case, as disclosed by the record. The appeal was taken, and is prosecuted alone from the action of the District Court in overruling the motion for a new trial.

This court uniformly held, in a long line of decisions, from case of Shultz v. The State, 13 Texas, 401, to Lane v. Ellinger, 32 Texas, 369, inclusive, that without final judgment, there could be no appeal to this court. The same rule has been held, both in civil and criminal causes; and, indeed, the rule must be the same in both classes of cases, as the reason of the rule is the same in both. The jurisdiction of this court is appellate only, and is only conferred by positive law; there is no provision of the law which, in any case, gives the right of appeal, except from judgments *rendered* against the parties appealing.

The rule above laid down, and which was so long and so consistently maintained by this court, was disregarded and overruled in Hoppe v. The State, 32 Texas, 389.

In the opinion in that case, Mr. Justice Lindsay says: "We think the import of Article 3151 is too clear and palpable to the understanding to be called in question, that the convict may appeal from such a judgment to this court." The judgment here referred to is the judgment

of the District Court overruling the motion for a new trial. In that case, as in this, there was no judgment rendered on the verdict of conviction—no judgment except that overruling the motion for a new trial.

This section (3151, Pas. Dig.), certainly confers no jurisdiction on this court, and it was not intended by the legislative mind to confer any. It only recognized an exercise of such jurisdiction as is conferred by law; and this section must be construed in connection and in harmony with the law conferring jurisdiction.

We think the opinion in Hoppe v. The State is based on a misconception of the true import of the language used in Article 3151; and especially does this so appear when construed in connection with Article 3183. The latter article reads as follows: "An appeal may be taken by the defendant in every case where judgment of conviction has been rendered against him in the District Court," etc.

This is the law, and all of the law, which gives the right of appeal in this class of cases. By its very terms the appeal only lies from the judgment of conviction "rendered;" not from the judgment overruling the motion for a new trial; nor from the verdict of the jury; nor from any other part of the proceedings in the case. The very language of Article 3183 is its own best interpretation. What language can be clearer or more conclusive?

Now, in view of the language used in Article 3183, what is the true intent of Article 3151? This latter article reads as follows: "When, from any cause whatever, a verdict of conviction has been returned, and there is a failure to enter judgment and pronounce sentence during the term, the judgment may be entered and sentence pronounced at the next succeeding term of the court, unless a new trial has been granted, or the judgment arrested, or an appeal has been taken."

A proper analysis of the above language clearly develops this meaning: When, for any cause whatever, after a verdict of conviction has been returned, there is a failure to enter judgment, the judgment may be entered at the next succeeding term of the court, unless a new trial has been granted, or the judgment has been arrested; and if there is a failure to pronounce sentence during the term, the sentence may be pronounced at the next succeeding term of the court, unless an appeal has been taken.

Had the two failures in the District Court, intended to be cured by that section, been provided for, not in a single section and a single sentence, but in two distinct sections, as is usual in the provisions of the Code of Procedure, the erroneous construction placed by the court on Article 3151, in Hoppe v. The State, would have been avoided.

For the reasons set out in this opinion we are satisfied that this court should recede from the ruling in Hoppe v. The State, and return to the former rulings on the subject of appeals from the District Court to this court.

DISMISSED.

OGDEN, P. J.—I concur in the above opinion. The case is therefore dismissed for want of final judgment.

The cases of Smith and Fulcher v. The State, Nos. 1688 and 1689, will be dismissed, for the reasons set forth in this opinion.

WALKER, J., *dissenting*.—It is not my purpose in writing a dissenting opinion to weaken or unsettle by criticism the opinion of the majority of the court rendered in this case. The majority of the court have boldly overruled the case of Hoppe v. The State, following, as we are told, the previous rulings of the court. I am unable to

find that the precise point raised in this case has ever been adjudicated in any criminal case decided before Hoppe v. The State. In Shultz v. The State, 13 Texas, 401; Burrel v. The State, 16 Texas, 147; in Calvin v. The State, 23 Texas, 577, and in perhaps one or two earlier cases, in none of which does it appear that an appeal had been taken from a judgment overruling a motion for a new trial or a motion in arrest of judgment, the courts have held that an appeal would not lie to the Supreme Court on a verdict of conviction where no final judgment had been entered. I believe I have thus fairly stated the doctrine of the earlier cases. I will restate it; it is this: An appeal will not lie from a verdict of conviction where no final judgment has been entered. I will place this doctrine in juxtaposition with the statute—Article 3151, Paschal's Digest. The article reads thus: "Where, from any cause whatever, a verdict of conviction has been returned and there is a failure to enter judgment and pronounce sentence during the term, the judgment may be entered and sentence pronounced at the next succeeding term of the court, unless a new trial has been granted, or the judgment arrested, or an appeal has been taken."

It is announced in the opinion of the majority of the court that this statute confers no jurisdiction upon the Supreme Court. Certainly not. I do not for one moment claim that it does; but the Constitution confers an appellate jurisdiction upon this court, and warrants the allowance of an appeal whenever, in the opinion of any member of the court, any error in law has been committed in the District Court. Suppose, then, a failure to enter final judgment on the verdict of conviction is the very error complained of. Will it be contended for one moment that a judge of this court has no power under the present Constitution to grant the appeal?

I assert it as my unqualified belief that it would be the

duty of any member of this court, regarding the final judgment, so-called, as a *sine qua non*, to grant the appeal for this reason alone, and it would be the duty of the court to correct the error. But what is the force of Article 3151? It provides that a final judgment may be entered at a succeeding term of the court where it has been omitted at the trial term, if a new trial has not been granted, the judgment arrested, or an appeal taken. And suppose an appeal has been taken, then what does the Legislature say? If it is not said that nothing more shall be done in the District Court until the appeal has been determined, then the necessary action of the District Court may be had; but we may well ask ourselves what is properly to be regarded as a final judgment in any case, and the question is fully answered in Kennedy v. Morrison, 31 Texas, 220. In delivering the opinion of the court the Chief Justice says: "In appealing from the final or last judgment that was rendered in the cause, whether that judgment should be the adjudication of the court, that the defendant go hence, etc., or that the plaintiff have and recover, etc., or that a new trial be granted or refused to a party applying for the same—in either of these cases the last judgment appealed from brings up for the revision of this court all the previous proceedings or interlocutory judgments."

It might be insisted with much plausibility that a motion for a new trial, or a motion in arrest, would be irregular and certainly unnecessary if no final judgment had been entered on the verdict.

But this court would not allow an appeal, unless one or the other of these motions had been made in the District Court and overruled. Suppose, then, neither of these motions be made in the District Court where no final judgment has been entered, and the court goes on and sentences the prisoner to the punishment to which the

jury has condemned him. This sentence will stand as a final judgment, and in my opinion the prisoner can take no exception to it; and here, I think, arises much of the difficulty attaching to this question. What is insisted on as a final judgment should, under our law, be no more nor less than the sentence of the court condemning the prisoner to suffer the penalty awarded by the verdict. Our criminal law is peculiar. Under our system the court does not adjudge the punishment. The jury fixes that. The judgment of the court can add nothing to it, and diminishes nothing from it. All the court can do with it is to set it aside and grant a new trial, or arrest it for some legal insufficiency of the record.

Is it necessary, then, in order to give force to the verdict, that the judge should say, "I approve the verdict of the jury," or use some such unnecessary form of words, as will indicate that the judge does what he cannot help doing?

Form, and form only, has prescribed that the judge, before the prisoner is taken to the cell or the scaffold, shall address the prisoner, notifying him of his punishment, and the time and manner of its execution, concluding with a benediction; but this is the last ceremonial of the court; and if it be a judgment, it is the final judgment, and no appeal can be taken from it; nor can it be pronounced, where an appeal has been taken, until that appeal has been determined against the prisoner.

It was the opinion of the late Presiding Justice of this court, and is certainly entitled to consideration, that the 3d Section of the 5th Article of the Constitution does away with all necessary controversy on this subject. The section reads thus:

"In criminal cases, no appeal shall be allowed to the Supreme Court, unless some judge thereof shall, upon inspecting a transcript of the record, believe that some error

of law has been committed by the judge before whom the cause was tried."

I again recur to this, and maintain that, if it be error in law to omit the so-called final judgment, the appeal should be allowed, and the error corrected. But in attaching the importance I do in this consideration to the foregoing clause of the Constitution, I by no means surrender the doctrine of Hoppe v. The State, 32 Texas, 389.

Here the question was fairly met, that a party convicted may appeal from a judgment overruling his motion for a new trial, though no judgment has been entered upon the verdict of conviction.

It cannot be said that until judgment is entered on the verdict the prisoner has no ground for a motion for a new trial, and nothing to appeal from. Such is not the fact nor the law. The verdict of the jury fixing the measure of his punishment is against him, and if he resist it by no motion, nor appeal, and sentence follow, his doom is sealed. But to relieve the learned court that decided Hoppe v. The State from any charge of inconsistency by reason of a supposed clash between Hoppe v. The State and Lane v. Ellinger, I must examine the latter case; and though Lane v. Ellinger is quoted as authority in the opinion of the majority of the court, I think the most cursory examination of the case will show that it has nothing to do whatever with the principle involved in the case at bar, and in Hoppe v. The State. All that was decided in Lane v. Ellinger is simply that no writ of error will lie to a refusal by a District Judge to enter a final judgment in a cause. I humbly submit that this case, thus fairly stated, gives no support whatever to the opinion of the majority of the court. It was no doubt properly considered by the court in Lane v. Ellinger that *mandamus* was the proper remedy. I submit my opinion with all deference to the decision of a majority of the court.

SIMEON HART v. W. W. MILLS.

1. The statute fixing the time for the prosecution of writs of error to the Supreme Court within two years of the rendition of judgment, is not a law of limitation.
2. The 43d Section of Article 12 of the Constitution has reference to the time in which civil actions may be commenced in the State courts, and does not apply to matters of practice in the courts relating to actions therein pending.
3. A writ of error is not a new or original suit, but a continuation of the original cause, and the affirmance of a judgment in the Supreme Court recognizes the validity of the judgment from the date of its rendition in the District Court.

ERROR from El Paso. Tried below before the Hon. W. P. Bacon.

This case was formerly before the Supreme Court on writ of error, and is reported in 31 Texas, 304, to which reference is made for a statement of the case.

It was dismissed by the Supreme Court in 1868, and on the eleventh of March, 1872, Hart again sued out writ of error.

Hancock & West, for plaintiff in error.—The language of the Constitution is as follows: "The statutes of limitation of civil suits were suspended by the so-called act of secession of the twenty-eighth of January, 1861, and shall be considered as suspended within this State until the acceptance of this Constitution by the United States Congress." (Section 43, Article 12.)

These terms are very broad and sweeping. They are an authoritative announcement by the highest political authority in the State that "the statutes of limitation of civil suits" (not one statute, nor any particular part of any statute, but all statutes of limitation), were, by the act of secession, *ipso facto*, suspended. That act was an act of war, suspending all statutes of limitation, and that

no limitation, of any kind, shall run during the period named.

The views of counsel on this point are much too narrow to embrace the object intended by this provision of the Constitution.

The framers of the Constitution meant to announce, and did announce, that the period of time indicated was a time of war, and that no limitation should be computed for that period. No mention was made of any of the acts of the rebel Legislature suspending statutes of limitation; they were entirely ignored. These latter did not suspend them, but the act of secession—an act of war—suspended all statutes of limitation.

We will not further discuss the question whether the statute fixing the time in which civil actions shall be commenced in the Supreme Court is less a statute of limitation than one fixing the time in which a civil action shall be commenced in the District Court.

In Taylor v. Boyd, 3 Ohio, 354, it is held that "the writ of error is a new and original suit, and not a continuance of the original cause."

And that a proceeding by writ of error is a civil suit, and that the commencement of a suit by writ of error in the Supreme Court is the commencement of a civil suit seems to follow as a matter of course. That Bacon regarded a proceeding by writ of error as a civil suit will appear from the following citation: "Writs of error or false judgment are of a higher nature than all other kinds of civil suits." (3 Bac. Abr., 321.)

When to this we add the fact that the provision concerning the time in which writs of error shall be sued out constitutes the ninth section of our statute of limitation (Pas. Dig., Art. 4616), it would seem to leave no doubt that it has been defined and declared by our Legislature to be a statute of limitation.

Opinion of the Court.

The argument of counsel, as to what statutes of limitation were, or were not, suspended by the rebel Legislatures of Texas, is wholly foreign to the matter in hand. They were all suspended during the rebellion, and the clause above referred to of our present State Constitution fixed the day when it commenced and the day when it ceased. During that period all statutes of limitation of civil suits were suspended—regardless of what stay laws were, or were not, passed by the Texas Legislature during the rebellion—during the time fixed by the present Constitution.

A. J. Hamilton, for defendant in error.

WALKER, J.—The only question which we have felt called on in this case to consider is that involved in the motion to dismiss the writ of error. The writ was not sued out within the time limited by law for bringing causes to this court from the District Courts by writ of error.

The argument in the case turns upon the question involved and decided in Bender v. Crawford, 33 Texas, 745. It may be well here to remark that the latter case is treated in a note by the Reporter in Story v. Runkle, 32 Texas, 398, as in conflict with the latter case. Whatever may be the conflict between these two cases, we think it is well disposed of in the closing paragraph of the syllabus to Bender v. Crawford, and we again say that that portion of the opinion in Story v. Runkle, which is in conflict with Bender v. Crawford, is *obiter dicta*. In Crawford v. Bender the court meant no more than to interpret the 43d Section of the 12th Article of the Constitution, in its application to the time within which civil suits might be commenced. There are a number of limitations in the probate acts and practice acts which do not

come within the meaning of the Constitution, when it speaks of the statutes of limitation of civil suits. It is true that in a certain sense all these statutes are statutes of limitation within the general meaning of the term; but we have not heretofore held and cannot now hold that these statutes are within the meaning of the Constitution, and the question is not therefore passed upon by the court in Bender v. Crawford. We think the Constitution has reference merely to the time in which civil actions may be commenced in the State courts, and does not apply to matters of practice in the courts touching actions therein pending.

The time given for the prosecution of writs of error to the Supreme Court is regulated by a rule of practice, and we do not think it capable of any other construction, although it may be found in the general statute of limitation. I think it is well remarked, in the brief of the appellee, that the statute fixing the time within which a cause must be taken to the Supreme Court, is no more nor less a statute of limitation than that which prescribes the time within which a record must be filed in this court, or a motion made for a new trial in the District Court, or a suit brought against an administrator or executor on a rejected claim.

The constitutional provision undoubtedly applies to actions which have not yet been prosecuted, and *not* to those pending in the courts.

It is maintained in argument by the appellant's counsel that the prosecution of a writ of error is a new and original suit, and that it is not a continuation of the original cause; and the case of Taylor v. Boyd, 3 Ohio, 354, is referred to as authority in support of this position. This doctrine should not be recognized in the State of Texas, where the affirmance of a judgment in the Supreme Court recognizes the vitality of the judgment from

the date of its rendition in the District Court. The writ of error in this case not having been sued out within two years of the rendition of the judgment, must be dismissed.

DISMISSED.

SIMEON HART v. W. W. MILLS.

1. While a complete denial under oath of all the equities in a bill for injunction does not entitle the party to a dissolution of the injunction as a matter of law, yet it places the whole matter within the sound discretion of the court to dissolve the injunction or not, as the equities of the case may require; and the exercise of that discretion will not be revised by the Supreme Court, unless it be manifest that error has been committed.
2. Pending a bill of review, injunction should not be resorted to by the plaintiff in the bill of review as an independent proceeding to stay execution in the original suit.

APPEAL from El Paso. Tried below before the Hon. S. B. Newcomb.

The appellant, on September 20, 1871, filed a petition for an injunction to restrain the collection of a judgment. The petition alleged that September 12, 1866, the appellee obtained a judgment against the appellant for $50,000; that this judgment was obtained by the grossest fraud and malpractice; that it was absolutely void for want of service on the appellant; that the acts of the attorney representing the appellant in that cause were unauthorized and not binding on the appellant; that through intimidation the appellant was forced to flee from the country and remain absent for a long time, and thereby prevented from defending the said suit, and from instituting proceedings to set that judgment aside before the present time; that on August 25, 1871, the appellant filed a bill to review the said judgment, and the prayer of this

petition was for an injunction to restrain the issuance of executions on the judgment of 1866, pending the determination of the bill of review.

This petition is supported by the affidavits of A. C. Hyde and A. J. Fountain.

Upon these papers the injunction issued, and an injunction bond in $50,000 damages was filed.

September 25, 1871, the appellee filed his answer, which contained a general denial of the matters alleged in the bill of review, and of fraud in obtaining the judgment of 1866; an allegation that the appellant had knowledge of the said proceedings; that the appellant appeared in that cause, thereby waiving all irregularities and defects in the process; a denial of threats and intimidation against the appellant, except conditional threats, which are admitted; and denials of the other frauds charged in the petition.

This answer is supported by the affidavit of W. W. Mills, further denying the fraudulent acts charged, and to it is attached a copy of a letter purporting to have been written by Hyde, and produced to discredit him. There is also an affidavit of John O. Evans, relating to an assault made on the appellee. Then comes the affidavit of Watts, the appellee's attorney in the proceedings of 1866, denying the commission of any fraud by himself; and finally an affidavit of one Louis Cardis.

October 4, 1871, the appellee filed a motion to dissolve the injunction, which was overruled on the fourth of November, 1871.

January 24, the appellee filed an amended answer, alleging that the appellant, after the judgment of 1866, employed Zabriskie to carry that judgment to the Supreme Court on a writ of error; that the cause was dismissed, and that it was only after the dismissal that the present proceedings were instituted.

January 24, 1872, a new motion to dissolve was made, based upon a clerical mistake in the injunction bond, which describes the judgment of 1866 as rendered "on the twelfth day of September, A. D. 1871," instead of "on the twelfth day of September, A. D. 1866."

On this motion the District Court ordered the injunction dissolved.

Hancock & West, for appellant.

Walton & Green, for appellee.

OGDEN, P. J.—This is an appeal from a judgment of the District Court dissolving an injunction and dismissing the bill for the same. The injunction was sought in 1871, to stay the issuance of an execution upon a judgment rendered in that court in 1866, pending the proceedings on a bill for review, commenced in August, 1871. We think the bill filed in that case should have been made an exhibit in the petition for an injunction, that the court or judge applied to might have had an opportunity of determining the applicability of the two causes, and of determining the identity of complaint, and the merits of the first bill, to entitle a party to this extraordinary remedy.

It may be true that a complete denial, under oath, of all the equities in a bill for an injunction does not entitle a party to a dissolution of an injunction as a matter of law, but it certainly does place the whole matter within the sound discretion of the court, to dissolve the injunction or not, as the equities of the case may require; and the exercise of that discretion will not be revised by this court unless a manifest error has been committed.

This is a novel case. A judgment was rendered in 1866, and this injunction was sued out as an independent action to stay execution, in 1871, during the pendency of a

bill for review. We are not aware of any authority in this State for any such proceedings.

The grounds set out for the injunction are fraud and intimidation, and the illegality of the judgment sought to be restrained. The allegations of fraud, threats and intimidations, we think, are not only fully denied by the answer, but are proven not to be true by the affidavits of disinterested witnesses, and therefore cannot properly be claimed to support the maintenance of the injunction. There may have been irregularities on the trial of the original suit, in 1866, but we have discovered nothing in this record to convince us that the judgment is void, and therefore the proper subject for an injunction, after such a lapse of time. The service upon the defendant in that case may have been defective, or there may have been no service at all; yet the attorney of the defendant swears that he made an appearance in that suit for the defendant; that his action "in the case, from beginning to end, was the result of my own judgment and reflection, *under the instruction of my client;*" and therefore that appearance cured all defects in the service.

The defects in the original petition in the suit of 1866 are not subjects for our revision or criticism, as that is not before us; nor does the simple fact that the deputy sheriff acted as one of the jury in that case necessarily render that judgment void. We think the allegations and the equities of the bill for an injunction fully answered by the defendant, under oath, and the affidavits of other parties, and that the court did not err in dissolving the injunction.

The judgment is therefore affirmed.

AFFIRMED.

C. M. TAYLOR v. R. M. BONNETT.

1. It is error to take judgment against the wife after dismissing as to the husband.
2. It is error to join the wife with the husband in a suit on a promissory note executed by the husband and wife jointly, without showing it was given for the benefit of the wife's separate property.
3. An adjudication of bankruptcy against a defendant ousts the jurisdiction of the State courts over the bankrupt and his estate.

ERROR from Anderson. Tried below before the Hon. John G. Scott.

The facts sufficiently appear in the opinion of the court.

T. T. Gammage, for plaintiff in error, cited the following authorities: Paschal's Digest, Arts. 4642, 4643, and note 1052; Parker v. Haygood, 16 Texas; Magee v. White, 23 Texas, 180; Gamble v. Dabney, 20 Texas, 77; Boothe v. Cotton, 13 Texas, 364; Haynes v. Stroud, 25 Texas, 626; Christmas v. Smith, 10 Texas, 128; Brown v. Ector, 19 Texas, 346; McFaddin v. Crumpler, 20 Texas, 374; Shelby and Wife v. Perrin, 18 Texas, 517; Shipman v. Allen, 29 Texas, 20; Kavanaugh v. Brown, 1 Texas, 481; Trimble v. Miller, 24 Texas, 215; Covington v. Burleson, 28 Texas, 368; Rountree v. Thomas, 32 Texas, 288; Bennett v. Butterworth, 11 Texas, 675.

T. J. Word, for defendant in error, cited Todd v. Caldwell, 10 Texas, 236; Wright v. Hays, 10 Texas, 130; Cotton v. The State, 4 Texas, 260; and Sterling v. Dial, 10 Texas, 268.

WALKER, J.—In the month of September, 1866, R. M. Bonner brought the two suits, which are herein consolidated, for the use of McDaniel and Jackson. The suits are brought on two promissory notes, given by the defend-

ants, J. S. and C. M. Taylor, for the purchase of real property in the town of Palestine. There was a prayer for judgment and foreclosure of the vendor's lien.

But on the fourteenth of December, 1869, the plaintiff amended and prayed for a rescission of the contract of sale.

Pending the suit, J. S. Taylor, the husband, became a bankrupt, and pleaded his discharge in bankruptcy. The plaintiff dismissed the suit as to him, whereupon Mrs. Taylor plead her coverture and moved the court to dismiss the suit, her husband being no longer sued, and the action being one which sought to charge the community property of herself and husband. The court overruled this motion, and an exception was taken.

We are of opinion there are two grounds upon which this action could not proceed against Mrs. Taylor after her husband was declared a bankrupt and dismissed from the record. The first is that alleged in a motion for a new trial and saved in the first bill of exceptions.

The second is that, in stating which we are compelled to overrule our own decision in the case of Garner v. Smith.

At the time that case was decided, looking to the decisions of the Federal courts made under former bankrupt laws, and one or more cases decided under the bankrupt act of March 2, 1867, we held that a State court, having obtained jurisdiction over the person and property of the bankrupt more than four months prior to his being adjudged a bankrupt, was not ousted of its jurisdiction by the defendant going into bankruptcy.

This case was carried to the Supreme Court of the United States, as we are informed, but we regret that no decision will be rendered in that court, the parties having compromised.

But later cases have come before us, and upon due ex-

amination of the later decisions of the Federal courts, wherein a distinction is taken between the bankrupt act of 1867 and that of 1841, we are led to consider that the State court does loose its jurisdiction of the bankrupt and his estate whenever he goes into bankruptcy, and that all persons holding liens against his estate must prove them up under the bankrupt law and have them adjudicated in a bankrupt court, and that the State court can proceed no further to enforce them.

Having prepared a much more elaborate opinion in another case in which Garner v. Smith is overruled, we excuse ourselves from referring to authorities in this case.

Had it been proper for the District Court to proceed in this case against Mrs. Taylor, we think it was error to declare a cancellation of the contract without giving her the opportunity of paying the debt.

The judgment of the District Court will be reversed and the cause dismissed.

REVERSED AND DISMISSED.

GEO. PFEIFFER v. H. A. MALTBY.

1. It is error to dismiss a case upon any reason not apparent upon the face of the petition.
2. The report of an auditor of a fact which would, if true, defeat the action, cannot justify the court in dismissing the suit.
3. Parties have a right to trial by jury, and when a jury is demanded it is error in the court to dismiss the case upon a fact ascertained by the court from report of an auditor.
4. The fact that a partnership sold wares by them manufactured to the Confederate States authorities will not defeat an action by one of the firm for an account of the gains of such partnership.

ERROR from Nueces. Tried below before the Hon. B. F. Neal.

This was a suit by publication and attachment, brought by plaintiff in error against defendant in error, January 15, 1866, on an account for tools furnished defendant by plaintiff, in 1863, for the purpose of carrying on a partnership business between the parties, in the manufacture of tin ware, and for settlement of the partnership account.

The attachment was levied on a house and lots in the town of Corpus Christi; and at the December term, 1866, defendant answered, claiming the property levied on as his homestead.

The District Court, in 1870, appointed an auditor to state the account between the parties.

On the auditor making his report, March, 1871, the defendant moved to dismiss the suit, on the ground that it appeared, from the report, that plaintiff's claim was for one-half of the profits made by the partnership in furnishing the Confederate States army such articles as plaintiff and defendant were engaged in manufacturing, and which profits were in Confederate States notes, and accrued while the parties were actively engaged in rebellion, contrary to public policy.

The court thereupon dismissed the case, and plaintiff prosecuted his writ of error.

WALKER, J.—This was a suit on an open account. The plaintiff also sought a settlement of partnership accounts. The books and papers were referred to an auditor, who stated an account between the parties, showing a balance in favor of the plaintiff of something over $2000. Exceptions were filed to the report, and the plaintiff denied the exceptions, and moved for judgment on the report. A jury was called, but it does not appear that they rendered any verdict, but a judgment was entered for the defendant. Motion was made for a new trial and overruled. The plaintiff excepted to the judgment of the court.

Syllabus.

We are perfectly at a loss to know why this case was not passed on by a jury, and in the present state of the record we must consider it such error as to reverse the judgment. The mere fact that there was an auditor in the case does not take away the right of trial by jury.

We cannot in this case take away the right of the plaintiff to recover on the ground that some of the tin ware manufactured or sold by the firm may have been sold to Confederate troops. We have held heretofore that property acquired or money made by dealings in Confederate money may become the subject of litigation in our courts, but at the same time we have held that where the dealings of a co-partnership were conducted in Confederate money the losses and profits in such money were not the legitimate subjects of legal controversy.

This case is reversed and remanded.

REVERSED AND REMANDED.

F. S. MERIWEATHER v. G. W. WHITLEY.

1. The 21st Section of the Act of October, 1866, prohibited appeals to the Supreme Court in cases appealed to the District Court from the County Court, in judgments less than two hundred dollars. The repeal of said act did not confer additional jurisdiction over cases pending in said courts.
2. Appeal dismissed, it being from a judgment less than two hundred dollars, and in a case appealed from the County to the District Court.

APPEAL from Houston. Tried below before the Hon. L. W. Cooper.

The opinion sufficiently sets out the facts.

D. A. Nunn, for appellants.

H. W. Moore and *Hancock & West*, for appellees.

Statement of the case.

OGDEN, P. J.—This suit originated in the County Court, under the Act of October, 1866, the 21st Section of which reads as follows:

"And no cause which may be brought up by appeal from the County Court to the District Court can be appealed thence to the Supreme Court, where the matter in controversy does not exceed two hundred dollars."

This case was duly tried in the County Court, appealed to the District Court, where a judgment was rendered for appellee. The demand claimed was less than two hundred dollars; and we have often held that an appeal to this court did not lie in such cases, and the fact that the virtual repeal of the act of October, 1866, before the final hearing in the District Court, could not affect the rights of the parties, or confer additional jurisdiction upon this court.

The appeal is therefore dismissed for want of jurisdiction in this court.

DISMISSED.

DELILAH JOPLIN v. JACOB W. FLEMING.

1. The right of homestead does not attach until the land is paid for.
2. In a conditional exchange of property, if the contract is not executed in a reasonable time, the party not in default may rescind and recover back the property so contracted to be exchanged.

APPEAL from Marion. Tried below before the Hon. J. D. McAdoo.

This suit was brought on fifteenth of September, 1870, by J. W. Fleming, to recover of the appellant a tract of land of fifty-two acres in Marion county.

In December, 1862, the appellee entered into a contract with Annie E. Smedley, wife of John C. Smedley, for an

exchange of lands; the appellee agreeing to convey the land sued for, for a tract of sixty-one acres then occupied and owned by John C. Smedley as a homestead. Smedley was absent from the State at the time of the contract. The papers exchanged between the parties were title bonds, and the sale of the land conditional.

The two tracts of land were the homesteads of the two parties respectively.

On the delivery of the title bonds the parties exchanged possession of the land. In 1865 Annie E. Smedley made a sale of the tract of fifty-two acres to one M. W. Joplin and placed him in possession; and about December of that year, Joplin, who was the husband of the appellant, being just divorced from his wife, made a transfer to her and placed her in possession.

Shortly after the sale by Mrs. Smedley to Joplin, John C. Smedley, the husband, returned to Texas.

In 1868 Smedley and wife left Texas, and some time in 1869, while in Kentucky, Smedley died. In 1868 the tract of sixty-one acres was sold under execution, by virtue of a judgment in favor of J. M. Frith, against John C. and Ellen Smedley, at which sale Amanda Frith became the purchaser, and in November, 1868, entered upon the land, evicting the appellee, and continues to hold possession.

At the May Term, 1872, Margaret F. Fleming, wife of appellee, joined her husband as plaintiff, claiming the fifty-two acre tract as a homestead. Appellee and his family removed from Marion county, in 1863, to San Antonio, and returned in 1865, finding M. W. Joplin in possession.

When John C. Smedley returned after the war closed, appellee was willing to comply with his contract, but Smedley refused.

On the trial the court instructed the jury that "the

legal title to the land in controversy remained in Fleming; and if the contract of Mrs. Smedley was not complied with in a reasonable time after the return of John C. Smedley to the State, and no offer was made to complete the title according to Mrs. Smedley's contract, and that Mrs. Smedley with her husband abandoned the country without making such deed, as was contracted to be made, and has since died, and that the land has been sold to pay the debts of Smedley and wife, then Fleming had the right to treat the contract as a nullity, and reclaim the land so contracted by him to be conveyed."

The jury found for the plaintiff, and defendant appealed.

No brief for appellant has been furnished the Reporters.

Mason & Campbell, for appellee.

OGDEN, P. J.—We have been unable to discover any such defects in the petition in this case as would render it obnoxious under a general demurrer. It clearly sets up a conditional exchange of two tracts of land, namely, the homestead of the plaintiff for that of John C. Smedley and wife, and most emphatically and specifically charges a total failure in the performance of the conditions on the part of Smedley and wife, and a knowledge on the part of defendant who was in possession of the land exchanged by plaintiff to the wife of Smedley. He claimed that by reason of such failure he was no longer bound by his agreement to exchange; and prays an order of the court restoring to him the possession of his homestead.

We think the petition sets forth a good and sufficient cause of action, with sufficient particularity and certainty to entitle the party to his action. Nor do we think the petition of Mrs. Fleming to intervene, for the purpose of protecting her homestead rights, demurrable, as she

clearly sets up the fact that the land in controversy was her homestead, and that she had never parted with her homestead rights in the same, under the forms prescribed by law; that she had never acquired any other homestead; and she asks the interposition of the court in her behalf. We are clearly of the opinion that she had a right to be heard, and, if her allegations proved to be true, a right to a judgment of the court in accordance with her prayer.

The exceptions taken to the ruling of the court in rejecting evidence are not well taken, for the reason that if the rejected testimony had been admitted by the court to go to the jury, it would have been wholly immaterial to the issues presented. At the time of the sale by Mrs. Smedley to Joplin, he knew she had no title; for there was none upon record, and he asked and received only a bond for title when she could make one; besides, he required personal security for the re-payment of the purchase money, in case she failed to make a title. With these facts before the court, he was estopped from claiming to be an innocent purchaser; and his testimony to that effect could only tend to confuse the jury, when it could in no way change the law of the case. Nor was the testimony in regard to what John C. Smedley might have said, after his return from the war, in 1865, at all material. It was not claimed that he had ever executed a title to Fleming, nor offered to execute one, in compliance with the agreement of his wife; on the contrary, it was positively proven that he had failed and refused to execute a deed during his life, and that his death made the execution of a deed impossible. It was, therefore, wholly immaterial what he may have said in 1865; and it was not error in the court in ruling out such testimony from the jury.

The charge of the court clearly sets forth the law of the

case, and all the law which was necessary in order to a proper determination of the rights of the parties.

The verdict of the jury was in strict conformity with the law as given, and the facts proven on the trial; and therefore the court did not err in overruling the motion for a new trial, and the judgment is affirmed.

AFFIRMED.

SUSAN VAUGHAN v. L. V. GREER.

1. A *bona fide* purchaser from an heir takes the estate as against the holder of an unrecorded deed from the ancestor.
2. Any deed duly recorded is notice to the world of whatever it contains, and no one can claim adversely to such deed as an innocent purchaser.
3. (But the deed purporting to have been executed by the ancestor was proven to be a forgery.)

APPEAL from Leon. Tried below before the Hon. John B. Rector.

This suit was originally trespass to try title, brought by L. V. Greer against Joseph Cates. Cates, the tenant of Susan Vaughan, abandoned the land, and Greer took possession, and changed his action to a suit to remove clouds from his title, and for judgment quieting his title against Mrs. Vaughan's claim.

Greer claimed by purchase on March 14, 1857, from Mary A. Poe and her husband, Judith Poe,—the recitals in the deed being as follows:

"Know all men by these presents, that I, Mary A. Poe, the former wife of Thomas Tilley, deceased, and the only heir and legal representative of the said Thomas Tilley, and I, Judith Poe, the present husband of said Mary A. Poe, all of the county of Nacogdoches, for and in consideration of work and labor done by Lewis V. Greer, in

attending to and locating and perfecting title to the headright certificate of said T. Tilley, for 1280 acres, and for the further consideration of two hundred dollars to us paid," etc.; conveying the 1280 acres sued for to said Greer.

The land was patented in name of Tilley, who seems to have died in 1844. The land was community property, and his wife, the said Mary A., was his sole heir. The payment of purchase money was proved.

This deed was recorded April 5, 1857.

The defendant set up a deed purporting to have been executed on the second of April, 1855, from Thomas Tilley, the patentee, to Wm. S. Perkins, which was recorded on the seventeenth of May, 1857, and proven to have been a forgery; and deed from Perkins to defendant, recorded July 23, 1859.

The other facts appear in the opinion of the court.

No brief furnished for appellant.

W. D. Wood, for appellee, cited Crosby v. Huston, 1 Texas, 23; Grumbles v. Sneed, 22 Texas, 574; Withered v. Boone, 17 Texas, 174; Watkins v. Edwards, 23 Texas, 528; Mitchell v. Pucket, 23 Texas, 573; Berry v. Donley, 26 Texas, 737.

OGDEN, P. J.—This was originally a suit in trespass to try title to a tract of 1280 acres of land, brought by appellee against one Cates. After the institution of the suit Cates, who was the tenant of appellant, abandoned the land and appellee took possession of the same, and then, by an amended petition, changed the character of his action into a suit against appellant to quiet title.

The registration laws would, we think, settle the question of title as between the parties in favor of appellee, if no other question had been presented to the court. It is

pretty clearly established by the evidence that Thomas Tilley, the original grantee of the land in controversy, died in 1844, leaving his widow, Mary A. Tilley, his sole surviving heir, and that the land in controversy, so far as the records disclosed, at the time of the death of said Thomas Tilley, was the community property of the said Thomas and his wife, Mary A. In 1857 Mary A., having intermarried with one Poe, joined by her husband, conveyed the land, for a valuable consideration paid, to appellee, Greer, and the deed was duly recorded in April, 1857, and up to that time and for two years after the records show no adverse claim to the land.

But in 1859 William Vaughan, under whom appellant claims title, purchased of one William S. Perkins, who claimed to be a vendee of Thomas Tilley of the land in controversy; but neither the deed from Tilley to Perkins, nor the one from Perkins to Vaughan, were recorded until 1859, two years after appellee had purchased and paid for the land, with no knowledge whatever of any adverse claim, and had his deed duly recorded.

These facts are sufficient to give appellee the land, and entitle him to an affirmance of the judgment of the District Court in his favor. We do not understand the law to be, as contended for by appellant's counsel, that the records of registration, in order to become constructive notice of a claim, must contain a record of a complete chain of title from or under the sovereignty of the soil. On the contrary, any deed or mesne conveyance, when duly recorded, is notice to the world of whatever it contains, and no one can claim adversely to it as an innocent purchaser without notice.

But it appears to have been proven to the satisfaction of the court and jury that the deed from Tilley to Perkins, under which appellant claims, was a base forgery, purporting to have been executed ten years after the death

of the grantee, and to have been acknowledged before a person as notary public who swears that at the date of the acknowledgment he was not a notary public, nor was he a citizen of the State; that he had never known or seen the grantor, and knew nothing of the conveyance or acknowledgment. With these facts before the jury it is difficult to understand how, with a due regard for their oaths, they could have found any other verdict than they did. And with these facts patent on the record of this case, we have failed to discover any grounds upon which appellant could hope for a reversal of the judgment in her favor.

The judgment of the District Court is, in all things, affirmed.

AFFIRMED.

C. C. ALEXANDER ET AL. v. W. W. THOMPSON ET AL.

1. Construction of a clause in a will, see this case.
2. Support and maintenance out of the general estate adjudged, instead of the minor's individual estate, under the following clause: "It is my earnest wish and desire that my executors, hereinafter named, shall take the custody and guardianship of all my minor children, and to them, under God, I commit them, requesting that, if their lives are spared, they shall be well and thoroughly educated and fitted for usefulness and for the active duties of life; and I desire and direct that so much of my estate as shall be deemed requisite shall be reserved from division to defray the expenses necessary to the proper education of all my minor children."
3. The amount of the judgment prayed for is taken as test of jurisdiction in a suit brought in the county court in 1868.

ERROR from Rusk. Tried below before the Hon. J. B. Williamson.

The facts sufficiently appear in the opinion.

Moore & Shelley, for plaintiff in error.

Wm. Steadman, for defendant in error.

WALKER, J.—There are two questions presented for our consideration by this record.

The first, was the appellant, Cherokee C. Alexander, entitled to her support during her minority out of the general estate of her father, Benjamin F. Thompson? or are the appellees right in charging her support and education against her individual estate? The eleventh clause of her father's will settles this question. It reads as follows:

"It is my earnest wish and desire that my executors, hereinafter named, shall take the custody and guardianship of all my minor children, and to them, under God, I commit them, requesting that, if their lives are spared, they shall be well and thoroughly educated and fitted for usefulness and for the active duties of life; and I desire and direct that so much of my estate as shall be deemed requisite shall be reserved from division to defray the expenses necessary to the proper education of all my minor children."

There might be some plausibility in contending that the expenses of education alone should be defrayed out of the reserved assets, but we think it was the intention of the testator thus to provide for the entire support and education of his minor children. He had sought by advances made to his elder children, and the directions given in the fifth clause of the will, to equalize the shares of his children in his estate. But it is easily gathered from the whole will that he intended to make some exception in favor of his minor children, to provide for their support and education during minority, and perhaps in favor of the daughter, Cherokee Caroline, by giving to her his watch, piano, a favorite slave, etc.

The second question relates to the jurisdiction of the

county court. We think a safe rule in all such cases would be, that the court should be governed by the amount of the judgment prayed for. In this case it did not exceed the jurisdiction of the county court, though the items of account would have exceeded, in the aggregate, the jurisdiction of the court, if no mistake had been made by the pleader in setting them out. The verdict of the jury and the judgment, perhaps, might be regarded as a safe rule in determining this question, and they bring the case within the jurisdiction of the court.

The judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

S. S. HUDEBURGH v. THE STATE OF TEXAS.

Defendant was tried before a justice of the peace, and convicted of a violation of the law regulating the carrying of fire-arms. The judgment of the court was that he "deliver to this court the pistol which he was in this case convicted of carrying, and that the sheriff hold said defendant in custody until this judgment is complied with." *Held*, such judgment was without authority of law and void.

APPEAL from Angelina. Tried below before the Hon. L. W. Cooper.

The facts appear in the opinion.

Sam. A. Wilson, for appellant.

Attorney-General, for the State.

MCADOO, J.—The appellant was brought before a justice of the peace on a charge of carrying a pistol on or about his person. He was convicted of the charge, and the justice entered the following judgment in the case: "It is ordered by the court, that the defendant, S. S.

Hudeburgh, pay to the State of Texas the sum of twenty-five dollars, and all the costs of this suit. It is further ordered, that said defendant, S. S. Hudeburgh, deliver to this court the pistol which he was in this case convicted of carrying, and that the sheriff of Angelina county hold said defendant in custody till the judgment is complied with on the part of said S. S. Hudeburgh."

Hudeburgh appeared before the District Court on *habeas corpus*, and on a hearing was remanded to the custody of the sheriff, "it appearing, to the satisfaction of the court, that the defendant is not illegally restrained of his liberty."

From this judgment an appeal was prosecuted to this court.

It appears from the evidence that the appellant was in the custody of the sheriff under and by virtue of the judgment of the justice's court quoted above; and that the pistol, for the carrying of which he had been convicted, was never at any time in the hands of the officers of the law, nor was it at any time under or in view of the court or any of the officers of the law.

The judgment of the District Court was erroneous. It practically remanded the appellant into the custody of the sheriff until the whole of the judgment of the justice's court was complied with. A part of that judgment was a nullity—that which related to the delivery into court of the pistol.

There is certainly nothing in the criminal law of this State which authorizes such a judgment. There is no power under the law to imprison any person until he produce into court even stolen property.

The proper judgment of the court below would have been that the prisoner be remanded into the custody of the sheriff until the fine and costs be paid, and that he then be discharged.

Statement of the case.

This case is reversed and remanded, with direction that the court below dispose of it in accordance with this opinion.

REVERSED AND REMANDED.

T. E. TULLIS v. R. G. SCOTT.

1. A defendant against whom a judgment by default was taken, disclosed in his motion to set aside the judgment and for a new trial, a good defense, and that his failure to appear in obedience to the process of court was on account of his compulsory attendance on the Federal Court elsewhere: *Held*, error to overrule the motion.
2. It is error to permit a plaintiff to amend his petition after default taken without first having the default set aside.
3. The return of a sheriff that he executed process "by delivering to the within named A. B., in person, a certified copy of this writ, and a copy of petition," without stating what petition, is not sufficient.
4. See opinion for a state of case in which the judgment against one sued for wrongful seizure and conversion of goods, was not sustained by the evidence.

APPEAL from Robertson. Tried below before the Hon. J. B. Rector.

The appellee brought suit in the District Court of Robertson county to the Spring Term, A. D. 1869, against Robert Porter, acting sheriff of said county, in trespass for the value of certain goods, drugs and merchandise, seized by said sheriff, by virtue of a writ of sequestration issued out of the District Court of Galveston county, commanding said sheriff to seize said goods, drugs and merchandise as the property of W. H. Dial.

At the Fall Term of said District Court of Robertson county, the plaintiff filed a supplemental petition, making James Davidson, A. Robira, and appellant, T. E. Tullis, parties defendant in said suit, by alleging that said defendants aided and assisted said sheriff, Porter, in

the commission of the trespass, and prayed that said Davidson, Robira and Tullis be served with proper citations and copies of the original and supplemental petitions.

A judgment by default was rendered against the defendant, T. E. Tullis, and the cause proceeded to trial against the other defendants upon the issues joined in their pleadings.

The demurrer of defendants, Davidson and Robira, to the petition was sustained by the court, and plaintiff then filed an amendment, after the judgment by default was rendered by the court against Tullis, the appellant. The cause was then submitted to the jury as to the other defendants, under the evidence and charge of the court.

Verdict rendered in favor of the other defendants, against the plaintiff.

Under instructions of the court damages were assessed against the appellant, in favor of appellee, for the sum of $3472, and final judgment entered against him for that amount by the court. The appellant made his motion for a new trial, which was overruled, and the judgment was brought by appeal to this court for revision.

The appellant made several assignments of error, among which were the following: 1. "The service upon this defendant was not sufficient in law to give the court jurisdiction."

2. "Because the court erred in instructing the jury to assess damages against this defendant, when the proof showed, upon the pleas of the other defendants, that the plaintiff had no proper cause of action."

3. "The court erred in overruling the defendant's motion for a new trial."

4. "The verdict of the jury was contrary to the law and evidence."

The return endorsed on the writ of citation was as follows:

"Came to hand, twenty-third day of September, A. D. 1871, and executed on the twenty-fifth day of September, A. D. 1871, by delivering to the within named T. E. Tullis, in person, a certified copy of this writ, and a copy of petition.

"W. B. FOREMAN, Sheriff B. C.,
"By W. L. Patillo, Deputy."

The character of the motion for new trial is shown in the opinion.

Davis & Beall, for appellant.—The sheriff's return does not state, in the language of the statute, that defendant was served with "a copy of the petition accompanying it;" much less that he was served with copies of the original and supplemental petitions, which was necessary in the case at bar.

The officer's return, endorsed on the writ, under his official oath, limits the judicial inquiry as to the manner of the service, and the maxim applies, "*Quod non apparet, non est.*" The authorities are clear that nothing can be presumed or inferred that is not manifest in the return. (Graves v. Robertson, 22 Texas, 130; Ib., 175; see Underhill v. Lockett, 20 Texas, 131.)

This court has in repeated decisions deprecated in strong language any departure from the plain requirements of the statute regulating sheriff's return of process. (See 19 Texas, 115; 22 Texas, 130.)

In appellant's motion for a new trial, he shows that he has a just defense to the plaintiff's action.

We submit that the motion should have prevailed, as he showed a good and equitable defense to the action, and sufficient reason for not making it in time.

There cannot be a several verdict for damages in a joint trespass, but the judgment must be joint against all the parties; and if the verdict be inconsistent the judgment

will be set aside. (4 Cushing, 392; 7 Wisconsin, 219; 1 Penn., 429; 1 Ala., 212; 2 Monr, Ky., 50; 8 Miss., 26; 12 N. Hamp., 302; 6 Cowan, 599; Hilliard New Trials, § 29; 2 Green, 102; 4 Esp., N. C., 158; 6 Binn., 316; 1 Day, 304; 5 Burr, 2790; 9 Pick., 555.)

Aycock & Hamman, for appellee.—Appellee relies in answer to appellant's position that the judgment in actions of tort must be against all the defendants, and therefore the default cannot be sustained against one, upon the following authorities: Legrand v. Paige, 7 Monroe, 401; Cunningham v. Dyer, 2 Monroe, 50; Dormer v. Flint, 2 Williams' (Vermont) R., 530; Bowman v. Noyes, 12 New Hampshire, 307; Hilliard on Torts, p. 180, § 25.

And that the plea of the defendants, in which they set up the writ of sequestration as a defense, was not sufficient, and should not have protected them, and is therefore not available for the defaulting defendant, etc., etc., even if the jury should have found on it, about which we know nothing, there being several pleas. (Hilliard on Torts, p. 30, §§ 3 and 5, and authorities cited; 1 Hilliard on Torts, pp. 492, 494, 495, 498, 516, 517, 518; 2 Hilliard on Torts, pp. 194, 195, 229, 243, 244.)

We insist that the case cannot be examined, except on the merits of Tullis' motion, and that shows no excuse for his failure to appear and answer; and as the cause of action against him is good, the judgment is conclusive against him. (Long and another v. Wortham, 4 Texas, 381; Niblett v. Shelton, 28 Texas, 548; Power v. Gillespie, 27 Texas, 370; Vardeman v. Edwards, 21 Texas, 737; Spencer v. Kinard, 12 Texas, 180; Cook v. De La Garza, 13 Texas, 431.)

OGDEN, P. J.—This action was originally brought against R. Porter, sheriff of Robertson county, Texas, for

the seizure of certain drugs and medicines; and by an amended petition, appellant, Tullis, and Davidson and Robira were made defendants.

Porter, Davidson and Robira answered, setting up their defenses; but Tullis failed to answer, and judgment was taken against him by default, with a writ of inquiry. The cause was submitted to a jury, who found in favor of Porter, Davidson and Robira, but, under the positive instructions of the court, found a verdict against Tullis, for the full value of the drugs seized by the sheriff. He filed a motion for a new trial, which was overruled by the court, and he has appealed.

The charge of the court, in effect, instructed the jury to find against the defendant, Tullis, the value of the goods seized by the sheriff. This, we think, was error. It was in proof that at the time of the alleged trespass of appellant, the drugs were not the property of the plaintiff. That Tullis had no other connection with the drugs than to assist the sheriff in taking an inventory of the same; that he was not present at the time the drugs were seized, and that he in no way aided in the seizure, removal or conversion of the same. Most clearly, then, under the evidence, the value of the drugs subsequently seized by the sheriff could form no measure of damage as against Tullis. If he had trespassed upon the property of plaintiff, he might have been liable for damages; but his liability should bear some relation to the injury committed. The evidence negatived any combination on the part of Tullis to seize or convert the goods; and he should not therefore be held to answer for others' trespasses or damages inflicted by them.

We think the court also erred in overruling appellant's motion for a new trial. He was not present by himself or counsel, and made no defense, but in his motion for a new trial he showed that he had a defense, and that his

absence from the court, and his failure to appear, in obedience to the process of the court, were caused by his compulsory attendance on the Federal Court at Austin. Under the authority of Thomas v. Womack, 13 Texas, 585, we think this a sufficient showing to entitle appellant to a new trial.

In the case of Portwood v. Wilburn, 33 Texas, 713, this court held, that it was error in the District Court to permit a plaintiff to amend his petition, after a default taken, without having that default set aside; and we have only to repeat that opinion, in order to decide one of the causes of complaint in this case.

We are also of the opinion that there is a defect in the sheriff's return of service on Tullis, which will require a reversal of the judgment. The sheriff certifies that he executed the same "by delivering to the within named, T. E. Tullis, in person, a certified copy of this writ, and a copy of petition." What petition? The return fails to inform us whether the copy of petition served was a copy of the petition in this or any other particular case. In Graves v. Robertson, 22 Texas, 130, and in Underhill v. Locket, in Robert v. Stockslager, 4 Texas, 307, this court has held that no presumptions will be indulged to aid the sheriff's return in order to support a judgment by default. The statute is plain and mandatory, and if parties will take judgment by default, without requiring a correct and specific return by the sheriff of the service of the citation, as the law directs, they should not complain if their judgment is set aside on an appeal.

For the reasons above given we think the court erred in overruling the motion for a new trial. The judgment of the District Court is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

Statement of the case.

THE STATE OF TEXAS v. MARIANO GARCIA.

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1. Under the statute of May 22, 1871, entitled "An act to encourage stock raising and for the protection of stock raisers," imposing certain fines recoverable before the District Court or any justice of the peace having jurisdiction, one half of the fine to be paid to the informer, and the other half into the county treasury: *Held*, that indictment will not lie, but proceedings should be upon the relation of the informer.
2. Under said act the fines can only be enforced on a *qui tam* action, prosecuted for the uses expressed in the statute.

APPEAL from Bexar. Tried below before the Hon. Geo. H. Noonan.

The indictment charged that the defendant "unlawfully and knowingly did purchase two hides from one Dyonesio Flores, he, the said Mariano Garcia, then and there well knowing that said Dyonesio Flores had skinned and taken off said hides of certain dead animals, to-wit, oxen; which said dead animals were not the property of said Dyonesio Flores, but were the property of one Juan Estevan de los Santos, and that said Dyonesio Flores, without the written authority of said Juan Estevan de los Santos, had skinned and taken off said hides from said animals as aforesaid, and that said hides were purchased by said Mariano Flores without a proper bill of sale, as required by law, and did sell said hides, or send the said hides to the hide yard of Reese & Sons, in the city of San Antonio, Texas, without furnishing a proper bill of sale or hide inspector's report, as required by law."

The defendant excepted to the indictment for the reasons following: 1. That he is not charged with the violation of any criminal law of the State of Texas.

2. That the violation of the law, as charged in the indictment, to-wit, the buying, knowingly, of a hide skinned from a dead animal without the consent of the owner,

is punishable by a fine of ten dollars, recoverable in a *qui tam* action at the instance of an informer, and in no other way.

The court sustained the exceptions. From this the State appealed, and the action of the court sustaining the exceptions is assigned as error.

Attorney-General, for the State.—It is not easy to discover how the judge arrived at his second reason for quashing the indictment, that the law "provides a special mode of proceeding by *qui tam* action," when, to a common mind, the reverse would appear to be true. The language of the 8th Section (according to the provisions of which the fine prescribed in the 16th is to be recovered), is "recoverable before the District Court, or any justice of the peace having jurisdiction, etc.; one-half whereof shall be paid to the informer, and the other half shall be paid into the county treasury; and the offender or offenders shall be confined in the common jail until the whole of the fine and costs shall be paid, for which execution may issue," etc.

The first question that arises is, "What interest has the informer in the fine inflicted by the 16th Section?" The 16th Section prescribes that the manner of recovery shall be governed by the provisions of the 8th Section; but the 16th Section expressly provides that the fine so recoverable shall be paid into the county treasury; the 8th Section points out the mode of recovery, but gives an entirely different destination to the fine imposed therein—one-half to the informer, the other half to the county treasury. Must it be understood that because the 16th Section adopts the mode of recovery of the 8th, that it also adopts the destination of fine of the 8th, in contradiction to its own provision of destination? Or is it more proper to understand the adoption to be confined strictly to the

manner in which the fine shall be recovered, omitting the destination of the fine, that being provided for in the 16th? Is it not, at the least, doubtful, if the informer has any interest in the fine under the section under consideration?

But, admitting the informer to have an interest in the fine, there is no language used in the 8th Section conferring on him the power to sue for it in a *qui tam* action; and "it is a general rule, that no action for a penalty can be maintained by a common informer, unless power is given to him for that purpose by the statute." (Colburn v. Swett, 1 Met. (Mass.) Rep., 234, and cases there cited.) As no such power is expressly conferred, it will hardly be inferred from the expression, "one-half whereof shall be paid to the informer;" and the provision will be a dead letter upon the statute book, if the informer may not sue for want of power, and the State may not prosecute because half the fine goes to the informer.

Another consideration: If the only mode of recovering the penalty be (as the judge seems disposed to believe) by *qui tam* action by the informer, how will the provision in the 8th Section, that "the offender, or offenders, shall be confined in the common jail until the whole of the fine and costs shall be paid," be enforced, while Section 15, of Article 1, of the Constitution declares, "No person shall ever be imprisoned for debt," for the *qui tam* suit is but an action of debt on penal statute?

McADOO, J.—This case is brought to this court by appeal from a judgment of the District Court, quashing the indictment. The indictment charged the appellee with unlawfully purchasing two hides taken from certain dead animals, not the property of the person from whom they were purchased. This indictment was found under the act of twenty-second of March, 1871, "An Act to encour-

age stock raising, and for the protection of stock raisers." (General Laws of 1871, 1st Ses., 117.)

The appellee moved to quash the indictment, which was sustained by the court, and the district attorney appealed to this court.

The bill of exceptions shows that the indictment was quashed because the act of May 22, 1871, is not amendatory of the Criminal Code, but provides another mode of procedure by *qui tam* action to recover penalties. These rulings of the court below are assigned as error.

We think the first ground of assignment of error is well taken. While the 1st Section of the code declares that "the design in enacting this code is to define, in plain language, every offense against the laws of this State, and to affix to each offense its proper punishment," we do not conceive that it was the intention of the Legislature, for all time to come, that all penal enactments should be necessarily appended to the code as amendments to it. Indeed, the 3rd Section of the code (Article 1605, Paschal's Digest) seems to exclude this idea in its terms. It reads as follows: "In order that the system of penal law in force in this State may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission as a penal offense unless the same is expressly defined and the penalty affixed by the written law of this State."

It was held in Cain v. The State, 20 Texas, 358, that the act of February 2, 1856, passed at the same session as the Penal Code, was not repealed by the code, though it was made no part of it. A conviction was also sustained in Brown v. The State, 20 Texas, 336, under the statute.

We hold that every enactment of the Legislature which defines, in plain language, an offense, and clearly affixes to such offense its proper punishment, must be regarded

as a valid penal law, whether the act have any reference to the code or not. The other ground assigned as error by the District Court for the quashing the indictment is of a graver character—that the act of May 22, 1871, does not contemplate a trial by an indictment, but by a *qui tam* action. Indeed, it is very difficult to perceive what mode of proceeding was intended by the Legislature to be adopted in the prosecution of the offense created by that act.

The whole act is somewhat incongruous. The 16th Section of the act, the one under which the indictment in this case was evidently framed, assesses a punishment of ten dollars fine "for each and every hide so skinned or purchased, recoverable as provided in Section 8 of this act, said fine to be paid into the county treasury."

Section 8, which provides for another branch of violations of this statute, makes the fine "recoverable before the District Court, or any justice of the peace having jurisdiction." It also provides: "One-half of the fine shall be paid to the informer, and the other half shall be paid into the county treasury."

In a penal action such as that contemplated in the 8th Section, the action cannot be by indictment, as the informer is entitled to one-half of the fine, and he must be a party to the action; this he cannot be where the trial is by indictment.

Proceedings should be upon the relation of the informer; in other words, it should be a *qui tam* action prosecuted for the uses expressed in the statute, and not an action by indictment presented by a grand jury.

As the mode for enforcing the penalty under the 16th Section is to be the same as that provided for in the 8th Section, though no reason appears therefor, the offense charged in this cause cannot be prosecuted by indictment.

The indictment therefore was properly quashed, and the judgment of the District Court is affirmed.

AFFIRMED.

MARKS WILSON v. THE STATE OF TEXAS.

1. An information filed by the district attorney must conclude "against the peace and dignity of the State."
2. Upon an information against an officer, for malfeasance in office, a trial without a jury is a nullity.
3. See this case for an information held insufficient in law to warrant a verdict or judgment against the defendant.

APPEAL from Robertson. Tried below before the Hon. J. B. Rector.

October 21, 1871, the district attorney filed an information against the appellant, Marks Wilson, charging "that Marks Wilson, a justice of the peace in and for the said county of Robertson, Precinct No. 1, duly commissioned and qualified in terms of the law, and by virtue of his said office of justice of the peace is a member of and presiding justice of the police court in and for said Robertson county, and is assessor of taxes for Precinct No. 1 in said county, is incompetent to discharge the duties of his said office. And the said attorney further charges that the said Marks Wilson, in his official capacity aforesaid, has committed many acts whereby the interest of the State has been and may be jeopardized; in this, that while acting in his capacity as presiding justice of the police court, the said Marks Wilson did, at divers times, propose, vote for and consent to the making and ordering upon the minutes of said court certain erroneous and illegal orders, a copy of which erroneous and illegal orders is herewith filed, and marked 'Exhibit A,'

and referred to as a part of this information. And the said attorney asks that a copy of said schedule of orders may be served on said Marks Wilson, justice as aforesaid, with this information. And the said attorney further charges that the said Marks Wilson has been delinquent in the performance of his duty as assessor of taxes; in this, that the said Marks Wilson did fail to make out the tax rolls in the manner prescribed by law, whereby the interest of the State may be jeopardized. And in support of the charge of incompetency herein made against the said Marks Wilson, the entire minutes and orders of the police court are referred to, from the fifteenth day of August, A. D. 1871, to the tenth day of September, A. D. 1871.

"It is further charged by said attorney that the parties in whose favor the said illegal orders were made drew the money thereon from the county funds of said Robertson county, greatly to the damage of the citizens and taxpayers of said county.

"The premises considered, the said attorney asks that the said Marks Wilson, justice as aforesaid, may be cited to answer to the charge of incompetency, and the several specification herein set forth, at the next term of your honor's court; and that on a final hearing the said Marks Wilson be adjudged incompetent to discharge the duties of his said office, and that he be removed from the same, and that he be adjudged to pay the costs of the impeachment."

Filed with said information was the copy of extracts from the minutes of the police court referred to, as follows (we give such orders as more directly apply to the case):

"EXHIBIT A.

"August 17, 1870.

"Ordered, that F. M. Hall, sheriff of Robertson county,

have a draft on the county treasurer for amount of this bill against the county, for arrest, mileage and fees due him for case State of Texas v. Marks Wilson, $107.

"August 20, 1870.

"Ordered, that C. Anschicks have an order on the county treasurer for six $\frac{60}{100}$ dollars for cost in case of State of Texas v. Campbell and Mathews. $6\frac{60}{100}$.

"August 20, 1870.

"It is ordered, that the justice of the peace, respectively, have an order on the county treasurer for three months' rent of office, and stationery, at twenty dollars a month in advance. The amount to receive is from August 1 to November 1, 1870.

"August 20, 1870.

"Ordered, that Marks Wilson, justice of the peace of Precinct No. 1, have a draft on the county treasurer for rent and stationery for three months, the sum of $60."

(Following are like orders in favor of the other justices.)

"September 7, 1870.

"The court having met pursuant to adjournment, the following members being present, Marks Wilson, chief justice; James H. Griffin, justice. There being no quorum present, it was ordered that Marks Wilson have an order on the county treasurer for ten dollars. $10.

"September 27, 1870.

"Ordered by the court, that M. Wilson, justice of the peace, Precinct No. 1, have an order on the county treasurer for fifty-eight dollars and sixty cents, for examination of James A. Graus, etc. $58\frac{60}{100}$.

"December 13, 1870.

"Ordered, that the justices of the peace present are to have an order on the county treasurer for four months' rent in advance, in compliance to an order to that effect

Statement of the case.

heretofore; which amount is due from the first day of November, 1871. The amount due each is the sum of twenty dollars per month; equal to eighty dollars due each justice present.

"December 13, 1870.

"Ordered, that M. Wilson have an order on the county treasurer for the sum of ninety-five dollars and seventy-five cents, for stationery, blank forms and printing for the six months past, be allowed. $95\frac{75}{100}$.

"March 31, 1871.

"Ordered by the court, that the bill presented by C. S. Gillespie for printing blanks for the several justices of the peace, to the amount of three hundred and thirty dollars, currency, be approved, and it is hereby ordered that he have an order on the treasurer for the same amount. $330

"June 23, 1871.

"Ordered, that M. Wilson have an order on the county treasurer for the sum of nine dollars, for three cords of wood bought of Lem. Barton, be allowed. $9.

"It is moved and seconded, that the justices present have the sum of one hundred and twenty dollars each for six month's rent in advance.

"It is also moved and seconded, that we take our pay out of the money turned into the court by S. J. Adams, and that we have drafts for such sums at once."

The said attorney states that the last order or resolution was not put upon the minutes of the court, but is given from memory, said attorney at that time being present in said court and an eye-witness to the conduct of the said Marks Wilson.

The defendant demurred to the information, and assigned several special causes of exception, and plead not guilty.

On October 24, 1871, the case was tried without a jury,

the defendant found incompetent to discharge the duties of his office, and was removed.

From which the defendant appealed, and errors below are assigned.

1. Overruling the plea to the jurisdiction of the court.
2. Overruling the exceptions to the information.
3. In refusing a trial by jury.

Davis & Beall, for appellant.—This was a proceeding in the nature of impeachment, instituted in the District Court under the provisions of the Tax Act of 1870 (see Laws of Twelfth Legislature, p. 204), to remove the defendant from his office of justice of the peace. And we submit, that the District Court had no proper jurisdiction, because the provisions of the Tax Act of 1870, in so far as they sought to confer the power of removing justices of the peace from office in the summary manner prescribed in said act, is obnoxious to the 12th Article of the State Constitution, Section 17, which provides "that every law enacted by the Legislature shall embrace but one object, and that shall be expressed in the title." This section of the organic law has been judicially construed to be *mandatory* in its terms. (See Cannon v. Hemphill, 7 Texas, 208.)

If, however, said provisions ever had any force, they were repealed, either expressly or by necessary implication, by the Tax Act of 1871. (See Laws of Twelfth Legislature, 1871, page 43.) Whenever a statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not revived by construction, but are annulled. (Ellis v. Paige, 1 Pick., 43, 45; 7 Mass., 140; 10 Pick., 39; 5 Texas, 423.) And when the new statute comprehends the subject matter of the old, the latter is repealed. (24 Texas, 478.)

If we regard this proceeding as criminal in its charac-

acter, then the exceptions ought to have been sustained, because the petition does not contain the essentials of an information, tested by the Criminal Procedure, Articles 2869, 2870 and 2871. It is neither supported by the accompanying "oath of some credible person," nor does it conclude, "against the peace and dignity of the State." The latter is a requirement of the Constitution of the State, and, by the express decision of the Supreme Court, cannot be dispensed with. (See 7 Texas, 74.)

But regarding this proceeding in the light of a civil or criminal action, we hold that our second assignment of error must be sustained. We respectfully submit that we were entitled to a jury trial upon the truth or falsity of the facts in said information alleged against the defendant. This constitutional right was denied him, and he appeals to this court to extend to him the ægis of its protection, with no other citation of authority on this point than the plain provisions of the Constitution, securing the right of trial by jury, in all cases, civil and criminal. (Article 5, Section 16; Article 1, Sections 8 and 12.)

MCADOO, J.—This case was brought into this court upon a writ of error from the Robertson County District Court.

The action was brought in the court below somewhat in the nature of a prosecution by presentment. The paper filed, however, by the district attorney does not conform to the legal requirements of a presentment. In one material particular at least it is defective, in that it does not conclude, "against the peace and dignity of the State."

The instrument charged, substantially, malfeasance and misfeasance in office, and incompetency to discharge the duties of the office of justice of the peace, which he, the plaintiff in error, held, and prayed that he be removed from office, and that he pay the cost of the proceedings.

The defendant plead to the jurisdiction of the court, the insufficiency of the presentment, a general denial of the allegations in the information, and not guilty.

The trial, if such it may be called, is thus chronicled in the record: "This day came the parties, by their attorneys; and the above cause coming on to be heard, and the matters in controversy being brought before the court, and the evidence and argument of counsel on either side having been heard and fully understood, it is considered by the court that Marks Wilson, justice of the peace of Precinct No. 1, and for the county of Robertson, and member of the police court in and for said county, be adjudged incompetent to discharge the duties of his said office. It is therefore ordered, adjudged and decreed, that the said Marks Wilson be, and the said Marks Wilson is hereby, forthwith removed from his said office as justice of the peace aforesaid, for incompetency and misconduct in office."

It appears that there was no trial by a jury, and no verdict of conviction for any offense for which a justice of the peace can be removed from office.

The presentment sets out no charges in such form as would have supplied a verdict of a jury or a judgment of the court.

The proceedings were void; and in accordance with the ruling of this court in the case of Thomas E. Hogg, *ex parte*, decided at the last term of this court, the judgment in this case is reversed and the case dismissed.

REVERSED AND DISMISSED.

Syllabus.

THE STATE OF TEXAS v. M. A. PHELPS ET AL.

A bail bond must show to what court the defendant is bound to appear.

APPEAL from Starr. Tried below before the Hon. Wm. H. Russell.

August 30, 1871, Pedro Gonzales, principal, and the appellees as sureties, executed a bail bond, the condition of which is as follows:

"Now if the said Pedro Gonzales shall be and appear in person before the Hon. District, at the next regular term, to be held in Rio Grande City, in said county, on the third Monday in November," etc.

The securities filed exceptions to said bond, which were sustained, and the State appealed.

Atorney-General, for the State.

OGDEN, P. J.—This is an appeal from a judgment quashing a forfeited bail bond. The bond bound the defendant to appear at the "Hon. District," without specifying what district, or county, or court at which the defendant was bound to appear, and on motion the court quashed the bond and dismissed the cause.

There is no error in the judgment, and it is affirmed.

AFFIRMED.

FELETOS OWENS v. THE STATE OF TEXAS.

1. An indictment under Article 2441, Paschal's Digest, charging defendant with taking up and using a certain sorrel *gelding*," etc., etc., "then and there an animal coming within the meaning of an estray," *held* good.
2. Prosecutions for unlawfully using an estray must be commenced within one year after the commission of the offense.

Argument for the State.

APPEAL from McLennan. Tried below before the Hon. J. H. Banton.

The appellant was indicted for taking up and using a "gelding," an estray within the meaning of the statute regulating estrays. Appellant excepted to the indictment, alleging that a *gelding* was not an estray within the meaning of the statute, which was overruled by the court. To this the appellant excepted, and assigned for error the action of the court on his exception.

The charge of the court that a prosecution for the offense charged was not barred until two years after its commission, was also assigned for error.

Miller & Dowell, and *John L. Dyer*, for appellant, cited Jordt v. The State, 31 Texas, 571; Swindel v. The State, 32 Texas, 102; Hooker v. The State, 4 Ohio, 348; Banks v. The State, 28 Texas, 647.

"It is insisted that the Constitution of the State of Texas, Art. 5, Sec. 17, gives justices of the peace jurisdiction of all misdemeanors, under such regulations as are prescribed by the Legislature (see p. 104, § 17, Justice Act, Laws Twelfth Leg.), and that the limitation in all misdemeanors under said constitutional and statutory provision and regulations, is brought down to one year, as provided for by the exception in Article 2653, Paschal's Digest, and that it was error in the court to charge the statute of limitation of two years."

Browne, for the State, cited 1 Bl. Com., 297. By Section 20 of Article 5 of the Constitution, "justices of the peace shall have such civil and criminal jurisdiction as shall be provided by law." By the act of thirteenth of August, 1870, the Legislature provided that "justices of the peace shall have and exercise jurisdiction to try all suits and actions in behalf of the State, or any county

thereof, or any individual, to recover penalties, fines and forfeitures, where such penalty, fine or forfeiture shall not exceed one hundred dollars." In this case the value of the animal is stated in the indictment as $75, and the penalty therefore might reach $150, which is beyond the jurisdiction of a justice; and, according to Paschal's Digest, Article 2653, the limitation is two years.

OGDEN, P. J.—The indictment in this case was framed under the act of 1858 (Paschal's Digest, 2441), and not, as erroneously supposed by counsel for appellant, under the civil statute of 1866, regulating the manner of estraying animals. The statute under which this indictment was framed reads in part as follows: "If any person shall, without complying with the law regulating estrays, take up and use, or otherwise dispose of any animal coming within the meaning of an estray, he shall be punished as prescribed," etc.

The Penal Code nowhere defines in precise terms what animals may come within the meaning of estrays. But in The State v. Abel, 14 Texas, 428, and in The State v. Crist, 32 Texas, 100, this court clearly recognizes a description of an estray which is known to the law, as some valuable domestic animal which had strayed from its owner. But our civil statute defines what animals may be estrayed, particularly specifying horse, mare, colt, mule, jack, jennet, or work ox. It would be unreasonable to suppose that the Legislature intended to exclude from among animals, which might be estrayed, that class of the horse kind called a gelding; since they may, as a general rule, be considered the most valuable animals of their kind, and at least as liable to estray from their owners. The word horse, as used in the statutes of 1850, 1851 and 1866, defining the manner of estraying stock, was evidently intended to be used in a *quasi*-generic sense, to

include every description of the male in contradistinction to the female or mare, whether stallion or gelding; and therefore if we have to recur to the statute of 1866, to determine what animals come within the meaning of estrays, we are clearly of the opinion that a gelding may become an estray, and that a person may be, as the appellant was, properly indicted, under Article 2441, Paschal's Digest, for taking up and using an estray gelding. The court did not, therefore, err in overruling the exceptions filed by appellant to the indictment presented against him.

But we think the court did err in charging the jury, that if they believe the defendant had committed the offense charged within two years, they should find him guilty. Article 2653, Paschal's Digest, provides, that in all misdemeanors where justices of the peace have concurrent jurisdiction with the District Court, the indictment may be presented within one year, and not thereafter; while Article 5, Section 17, of the Constitution provides, that all offenses of a less grade than a felony may be prosecuted before any justice of the peace. It follows that all misdemeanors may be prosecuted before a justice of the peace; and if prosecuted in the District Court, such prosecution must be had in one year, and not thereafter.

The court, therefore, erred in its instruction to the jury, and as there is no statement of facts this court cannot say that the error did not mislead the jury in their verdict. For this reason the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

HARMON FOWLER v. THE STATE OF TEXAS.

1. It is not essential that the indictment should charge the offense in the precise language of the statute.
2. Indictment charging defendant with driving live stock out of *the* instead of *its* accustomed range, *held* sufficient.

APPEAL from Burnet. Tried below before the Hon. E. B. Turner.

No brief for appellant has reached the Reporters.

Attorney-General, for the State.

OGDEN, P. J.—The indictment in this case is sufficient to support the charge of a violation of the law. It is not always absolutely essential that the indictment should charge the offense in precisely the language of the statute; so that equivalent words or terms be used, it is, in most cases, sufficient.

To charge the defendant with driving live stock out of *the* instead of *its* accustomed range, is charging one and the same offense, and a palpable violation of the law. The court, therefore, did not err in overruling the exception to the indictment. The evidence presented in the record is somewhat conflicting, but the court below, and the jury who tried this case, had greater opportunities of judging of the credibility of witnesses and the weight of testimony than this court has; and where, as in this case, there was sufficient testimony, if uncontradicted and unexplained, to support a verdict of guilty, this court will rarely interfere with the verdict of the jury because the same is not supported by the evidence. The law of the case was clearly and fully presented to the jury by the charge of the court, and we see no error in the judgment for which it should be reversed. It is therefore affirmed.

AFFIRMED.

THE STATE OF TEXAS v. JESSE BUTLER.

1. The refusal of the district judge to forfeit a recognizance is an interlocutory order from which no appeal can be taken.
2. An order transferring a criminal case to another county does not transfer the jurisdiction, unles the defendant be recognized to appear before the court to which the venue is sought to be changed.

APPEAL from Smith. The transcript does not show what judge sat in the court below.

Jesse Butler was indicted for arson in Smith county, at the Spring term, 1861. At the same term he entered into recognizance in the sum of five thousand dollars. The case was continued until December, 1868, when he executed a bond in the sum of five hundred dollars. At the April term, 1872, the presiding judge being disqualified, it was ordered that the cause "be transferred to Henderson, Rusk county, for trial, because the presiding judge had been of counsel for defendant." The original papers were forwarded to Rusk county, but the defendant was not recognized to appear there. At the December term, 1872, it was ordered by the District Court of Rusk county that the papers be returned to Smith county, because the District Court of Rusk county had no jurisdiction. At the March term, 1873, the district attorney filed his motion in the District Court of Smith county, asking that the defendant be called, and, upon default of appearance, that his bond be forfeited; which motion was overruled, because, in the opinion of the court, the judge, "having heretofore been of counsel, cannot sustain said motion;" from which ruling the district attorney appealed.

Attorney-General, for the State.

WALKER, J.—The appeal in this case must be dismissed. The order of the court appealed from is no final

judgment; it is simply an interlocutory order, which does not in any wise determine the case.

The case being properly on the docket of the District Court of Smith county, the defendant and his securities should have been called, and a judgment *nisi* entered on their failure to appear.

The order to change the venue to Rusk county had no operation in law until the defendant was recognized to appear before the District Court of that county. The order of the district judge of Rusk county dismissing the case from that docket was correct.

The appeal is dismissed.

DISMISSED.

JAMES P. AND JOHN G. NEWCOMB V. ELIZA NEWCOMB AND HEIRS OF J. C. HALL.

1. An order of the probate court made in 1849, setting aside to the widow $2000 "as an allowance secured to her by the Constitution of the State," for the benefit of herself and children, and permitting her to receive in part payment thereof the lots and buildings occupied as a homestead, was void for want of power in the court.
2. The widow acquired, under such an order, no title to property taken at the appraised value on the inventory to satisfy such an allowance.
3. Nor could third parties who were purchasers at a sale made to satisfy said allowance acquire any title by their purchase, though the sale was reported on and confirmed by the probate court.

ERROR from Bexar. Tried below before the Hon. George H. Noonan.

This suit was originally instituted by appellants, soon after attaining their majority, for the purpose of revising the action of the probate court regarding the land in controversy, which was claimed by the heirs of J. C. Hall.

The leading facts are: Thomas Newcomb, a widower

and father of the appellants, re-married in 1847, making Eliza ——— his second wife. She bore him two children; one died an infant before the father; the other, born after the father's death, died soon after. Thomas Newcomb died in the spring of 1849, in San Antonio.

His widow, Eliza Newcomb, administered; C. A. Harper was her attorney, and J. L. Hewitt, Harper's law partner, the chief justice of the county.

The probate record, incorporated in the statement of facts, shows the following:

The "McKnight title," No. 18 of the inventory, containing one quarter of a league in Goliad county, on the San Antonio river (the land in controversy), was appraised at $50. Harper, the attorney, was one of the appraisers.

August, 1849, Mrs. Newcomb, by Harper, her attorney, filed a petition that a guardian be appointed for the three children (her own child and the two plaintiffs), and that her allowed shares of the estate under the Constitution, and also her one year's maintenance and support, be set apart to her.

August 30, 1849, the court decreed that the sum of one thousand dollars, out of the proceeds of said estate, be appropriated and set apart for the yearly maintenance of said Eliza Newcomb, and the children of said Thomas Newcomb, and said administratrix.

November 28, 1849, the court decreed that the sum of two thousand dollars, secured to her by the Constitution, be set apart for the use and benefit of said widow and children, and that Mrs. Newcomb be permitted to receive in part payment of said allowance the lot or lots and buildings thereon, the "same being the residence of Thomas Newcomb."

January, 1850, the administratrix represented that a further sale of property was necessary to pay the main-

tenance of petitioner and her children; and reporting on the condition of the estate with reference to the year's maintenance and constitutional allowance, she reported to have taken from the inventory, at its appraised value, the following property:

House and lot marked No. 2 in inventory, and described as three lots in "La Villita" (homestead	$500 00
A tract of land on the San Antonio river, known as the McKnight title, marked in inventory No. 18, and located upon by J. R. Tally	50 00
A piano and money received by sales	316 50
Being a total of	$866 50

She then reported that she paid of said sum $607.78, leaving to her as paid on the allowances $258.72, claiming as still due her thereon $2741.28.

She then prayed, among other things, that there should be set apart to her all she had chosen from the inventory, as specified in the account current, and which had not been previously set apart to her, and that certain other lands be sold.

January 1, 1850, the court set aside to her the piano and the No. 18 tract of land on the San Antonio river, appraised at $50 (the land in controversy), and ordered a sale of other lands, the proceeds to be applied to her maintenance and constitutional allowance.

January 13, 1850, Mrs. Newcomb, through Harper, attorney, reported that she had sold the McKnight title, No. 18 of the inventory, at two hundred dollars; that she considered the sale necessary for her support; that it was the best sale she could make of it, and asked that the sale be approved.

February 1, 1850, the court decreed that said sale of No. 18 be approved.

No further action was had relative to the land in controversy.

The other leading facts are:

Thomas Newcomb having, in 1849, negotiated for a sale of the McKnight title land, No. 18 of the inventory, being one-fourth of a league, at $1.25 per acre, died without consummating the sale, Hall being in possession of the land.

September 18, 1849, Mrs. Newcomb, in consideration of fifty dollars, conveyed by deed the land No. 18, "having taken it from the inventory at its appraised value, as my separate property."

Said deed was acknowledged on January 18, 1850, before Judge Hewitt.

January 18, 1850, Harper, in consideration of $300, by quit-claim deed conveyed the same property to J. C. Hall, describing it as "being all the interest of said estate in said tract of land, the same having been chosen by said widow from the inventory at its appraised value, and set apart to her by order of the Probate Court of Bexar county as her separate property."

It further appeared that Tally, by agreement with Thomas Newcomb, was to get $300 for his location, the balance to be paid by Hall, partly in money, partly in a slave valued at $600. It appears that Harper, in his arrangements with Hall, had assumed to settle with Tally, and had paid him, except $75. Harper likewise took the slave valued at $600, and received the money.

It is left doubtful whether Mrs. Newcomb received anything; and if anything, whether $50 or $200.

It was shown by the probate record, and by other testimony, that there was a homestead in the Newcomb estate, the same being the property referred to in the order of November 28, 1849.

There was a verdict and judgment for defendant.

Opinion of the Court.

W. B. Leigh, for plaintiffs in error, contended that the constitutional allowance of two thousand dollars could not be made by the probate court for the benefit of the widow and children, in addition to the homestead occupied by them, and that the action of the court permitting the widow to take the homestead at its appraised value, in part payment of the allowance, was in palpable violation of Article 1177, Hartley's Digest. He also insisted that the order for the "constitutional allowance" was procured by a fraudulent combination, of which Hall had notice, and was used as a means of converting the estate into Mrs. Newcomb's individual property, in furtherance of a plan to make way with the property.

Walton & Green, *N. O. Green*, and *H. P. Brewster*, for defendants in error, insisted that the absence of an order making the "allowance in lieu of exempted articles," did not vitiate the setting aside of the McKnight land to the widow, and the approval of the selection after it was made by her; citing Dancy v. Strickling, 15 Texas, 557; Baker v. Coe, 20 Texas 429; Poor v. Boyce, 12 Texas, 440; Alexander v. Maverick, 18 Texas, 179.

WALKER, J.—This was an action brought for the purpose of revising and setting aside certain orders and decrees of the Probate Court of Bexar county.

The writ of *certiorari* was resorted to.

The questions now to be disposed of grow out of the following facts: Thomas Newcomb, the father of the appellants, died of cholera at the city of San Antonio in 1849. Previous to his death he had made a contract with J. C. Hall, by which he sold and conveyed his interest in the land in controversy to Hall. The land was known as "the McKnight title to one-fourth of a league of land in Goliad county, on the San Antonio river," and in the inventory of Thomas Newcomb's estate is set down as "No.

18." Hall went into possession of the land under his contract with Thomas Newcomb. Whether that contract was in writing or not does not fully appear, nor do we deem it important in the decision of this case.

It appears that one Tally had a location upon the land prior to Newcomb's claim, and Newcomb had entered into an arrangement by which Tally was to relieve the land of his location, in consideration of $300, to be paid by Newcomb.

The records of the probate court show that Eliza Newcomb, the widow of Thomas Newcomb, administered upon his estate. She was the second wife of Thomas Newcomb, and was the mother of two children by him. The appellants are the children of his first wife.

C. A. Harper was Mrs. Newcomb's attorney. The land in controversy was appraised at $50. Mrs. Newcomb had a homestead set apart to her, to-wit, the house and lot marked No. 2 in the inventory, but described as three lots in "La Villita."

At the August term of the probate court, 1849, Mrs. Newcomb was allowed $1000 out of the proceeds of the estate of her husband for her support and that of the children for one year.

In November following the probate court made her an additional allowance of $2000 for herself and children. In January, 1850, Mrs. Newcomb again represented to the probate court the condition of the estate, and that a further sale of property was necessary to pay the allowances made to her and the children.

She charged herself with the three lots in "La Villita," the homestead, taken at the appraisment ($500), and the McKnight title marked No. 18, with a piano and some moneys collected, making a total of $866.60. She credits herself with moneys paid out $607.78, and claims yet on her allowances $2741.28.

She prayed the court to set apart to her the McKnight title and the piano, which was done at the appraisment, and other lands were ordered to be sold to pay her allowances.

On the thirteenth of January, 1850, Mrs. Newcomb reported to the probate court that she had sold the McKnight title for $200; that it was the best sale she could make, and asked the court to approve the sale.

On the first of February, 1850, the court entered up an order approving the sale. No further action seems to have been had in the probate court; and Mrs. Newcomb having ceased to be a citizen, her letters were revoked in February, 1861.

Whether the sale for $200, as reported by Mrs. Newcomb and confirmed by the court, was a sham or not, it is impossible to determine with certainty, but there are some very remarkable facts connected with the whole transaction.

Mrs. Newcomb, on the eighteenth of September, 1849, conveyed the land in consideration of $50, as her separate property taken from the inventory. The deed was not acknowledged, however, until the eighteenth of January, 1850. On the same day Harper, Mrs. Newcomb's attorney, conveyed the land by quit-claim deed to J. C. Hall for $300.

It appears from the statement of facts that Tally received the greater part of the $300 which Newcomb was to give him to release his claim to the McKnight title; that Hall was to pay Newcomb at the rate of $1.25 per acre for the land, partly in money and partly in a slave.

It is singular enough that Harper, the attorney of Mrs. Newcomb, in the main, carries out this contract with Hall. He gets the slave valued at $600; he pays Tally, and what becomes of the rest of the money does not appear.

There being a homestead allowed to Mrs. Newcomb,

the $2000 allowed her by the probate court was not authorized by law, nor could she, to satisfy this illegal allowance, take property out of the inventory at its appraised value. Whatever acts of hers, in pursuance of her supposed right to this money, are to be counted on as making a title to Hall, must be regarded as null and void. Hall acquired no title by these measures; he has not paid the purchase money to any one legally authorized to receive it. The interest of the heirs of Thomas Newcomb could not be set aside in this manner, nor does Hall stand in a very advantageous light before this court. He had his remedy to enforce the specific performance of his contract with Thomas Newcomb, and this he should have resorted to; nor can he be heard to dispute the title of Thomas Newcomb, as it is evident that his own possession, and right to possession, came through Thomas Newcomb.

J. C. Hall has died, pending this suit; his heir, Wm. Hall, comes in to defend.

It is contended in the brief of the appellees, that the acts of Eliza Newcomb, as the administratrix, should be affirmed by this court, if for no other reason than that the estate of her deceased husband was largely indebted to her for the allowances made by the probate court. We have seen that one of these allowances she was not by law entitled to. It is also urged that this land was community property, and that her interest should pass to Hall. It is impossible for us to gather from the statement of facts the actual truth in the premises. But Thomas Newcomb had a right to sell this property to Hall, whether community or not; and if he hold it at all, he must hold it under his contract with Thomas Newcomb, and to do so he must pay the purchase money to some person legally authorized to receive it.

We have thought it best not to attempt to reform, and

render a judgment in this case; but that the facts may be more definitely ascertained, and the case proceeded in under this opinion, the judgment is reversed and the cause remanded.

REVERSED AND REMANDED.

C. H. McCORMICK & BRO. v. DAVID ARNSPIGER ET AL.

1. Until the passage of the non-intercourse acts by Congress in July, 1861, and the proclamation under said acts on sixteenth of August, 1861, commercial intercourse between citizens of Illinois and of Texas was not illegal.
2. The sale of property in Texas in May, 1861, by an agent residing in Texas, whose principal was residing at the time in Illinois, was not illegal as between such agent and the purchaser; and the principal, after the close of the war, can maintain his action for the agreed purchase money against such purchaser.
3. An agent in Texas, having property of his principal even after the non-intercourse proclamation, would be chargeable with a trust therein; and should he sell such property, the principal, at close of the war, could enforce such contract against the purchaser with notice of all the facts.
4. Payment to a Confederate States Receiver cannot be pleaded in satisfaction in a suit brought by the owner.

APPEAL from Grayson. Tried below before the Hon. C. C. Binkley.

It appears that in 1861 C. H. McCormick & Bro. were engaged in selling their reapers and reapers and mowers in Texas, and that they had a number of them in the hands of John McKay, as their agent, for the purpose of sale. It appears further that McKay had employed M. G. Bush as a sub-agent for McCormick & Bro. in said business. That said Bush, as such sub-agent, in May, 1861, sold one of these reapers to Arnspiger, for one hundred and eighty dollars, warranting the machine at the time of sale. That Arnspiger took possession of the machine at once, and,

upon trial, kept it. That Bush, being otherwise busily engaged, did not close the contract by note till October, 1861. That at that time there being a state of actual war between the United States and the States of the South—organized under the name of the Confederate States of America—which state of war had been formally recognized by both governments, Bush, for the interest of McCormick & Bro., and to avoid confiscation or sequestration by the Confederate States, took the note payable to John McKay, as if it were in his own right—McKay being a resident of Texas—this action of taking the note in the name of McKay being without the authority of McCormick & Bro. That afterwards Bush was required by the Receiver of the District Court of the Confederate States, under the sequestration laws of same, to deliver the said notes as the property of alien enemies, and the same were delivered to Patillo, the Receiver, and sequestrated and afterwards the said Patillo redelivered them to Bush, who held them subsequently by his authority.

After this Arnspiger voluntarily came forward and paid to Bush, in Confederate States notes, the amount of the note, and took possession of the same; he well knowing his payment was made for the benefit of the Confederate States, and that it was not made for the benefit of either McCormick & Bro. or of John McKay, the payee of the same.

Arnspiger, at the time he obtained the property, knew it was the property of McCormick & Bro.

After the return of peace, C. H. McCormick & Bro. proceeded to collect their assets in Texas, but found that many of the notes (if not all of them) had been given over to the Confederate States Receiver, and in this case the payee had got possession of his note from the Receiver, through Bush. Whereupon the plaintiffs brought this suit in the County Court of Grayson county, alleging that

the defendant had bought a reaper from the agent of McCormick & Bro., and had executed a note; also alleging that he had obtained possession of the note without having paid the same to McCormick & Bro., or for their benefit, and asking that he be required to produce it. To this petition defendant answered, admitting the purchase, setting forth the note and alleging its payment by him.

There were two trials in the county court, in the last of which, October, 1869, the court gave judgment for plaintiffs for $309, and defendants appealed to the District Court. At the October term, 1870, of the District Court, plaintiff amended his petition, alleging that there was a mistake as to the time at which the reaper was purchased; that the time really was May 10, 1861.

January 25, 1871, defendants filed plea in the District Court that the plaintiffs were citizens of Illinois, and defendants of Texas, at the time of the contract, and by reason of the war between the United States and Confederate States, the contract was illegal and could not be enforced.

May term, 1871, plaintiffs amended their petition, and again alleged that the sale of the reaper occurred in May, 1861, instead of October 19, 1861, which had been alleged by mistake.

Upon the facts as above given the court instructed the jury to find for the plaintiffs, "unless they believed from the evidence that at the time the note was made and delivered the plaintiffs resided in the State of Illinois and the defendants in the State of Texas, in which event, in order for the plaintiffs to recover, you must believe from the evidence that the note was made * * upon a valid and subsisting contract, made by the parties without any condition prior to August 16, 1861."

Instructions asked by plaintiffs were refused.

Verdict and judgment for defendants.

The errors assigned are:

1. "The court erred in refusing to give the special charge asked by the plaintiffs, to the effect that if the jury believe from the evidence that the sale and delivery of the reaper was made before the non-intercourse proclamation of August 16, 1861, the sale and delivery were legal."

2. "The court erred in its charge in fixing the 16th of August, 1861, as the limitation of legal contracts between the plaintiffs and defendant."

Walton & Green, for appellants, cited 2 Black, 870, The Prize Cases; 2 Brightly's Digest, 193, 278.

Joseph Bledsoe, for appellees, cited 7 Wall., 557, Coppell v. Hall.

OGDEN, P. J.—It may be gravely doubted whether the proclamation of the President of the United States, issued in 1861, declaring the blockade of certain ports, was intended to affect, or could have affected, the ordinary commercial relations of any portion of the citizens in the interior of the country.

The Congress of the United States were clearly of the opinion that no such effect could be attributed to that proclamation, since, on the 13th, and again on the 31st of July, 1861, acts were passed authorizing the President to declare, by proclamation, the inhabitants of certain States, or parts thereof, in a state of insurrection against the United States, and declares that upon the issuance of said proclamation, "all commercial intercourse by and between the same and the citizens thereof, and the citizens of the rest of the United States, shall cease and be unlawful so long as such condition of hostilities shall continue." The conclusion is, therefore, almost irresistible, that until the passage of these acts, and the issuance of the proclamation in pursuance thereof, commercial intercourse be-

tween the inhabitants of different portions of the country was not unlawful, unless carried on upon the high seas.

There was a marked difference in the rights and duties of citizens of foreign and independent nations, at the inception of the late war, and those which existed between the inhabitants of different portions of the United States, excepting in cases of an attempt to evade the blockade, and to violate some established law or usage of nations.

During the early part of the year 1861 there was, throughout the whole country, great excitement and confusion among the masses of the inhabitants, and but few, if any, appreciated or understood their relations to the general government, or to the citizens of any particular portion thereof. We think it may now be safely asserted, that if all opposition to the general government had promptly ceased, on the passage of the act of Congress, in July, 1861, or upon the issuance of the Presidential proclamation authorized by that act, no question would ever have been raised in regard to the legality of the domestic commercial intercourse of the different sections of the country.

The contract of sale, which is the subject matter of this suit, is proven to have been completed on the first of June, 1861, and the note was given simply as an evidence of that contract. Besides, it may be remarked that the note sued on bears no evidence of the illegal or treasonable character of the transaction, claimed by the defendant below. And in order to determine the legality or illegality of the contract, reference must be had to the time when the contract was actually made and consummated, which was in the spring of 1861. But was the contract, evidenced by the note here sued on, of such a character as would be considered illegal or treasonable at any time during the war?

In 1859 and 1860, and, indeed, up to the commencement

of the war, McKay was a citizen of Texas, but was the duly authorized agent of appellants, who were citizens of Illinois. As such agent he had accumulated a large amount of property belonging to appellants. When the war broke out it became unlawful for the people of Illinois and Texas to hold commercial intercourse, and as a necessary consequence the agency of McKay ceased. He could no longer represent citizens of Illinois for any purpose whatever, and must therefore have acted in his individual capacity. Certainly there was no law, municipal or international, which prohibited one citizen of Texas from selling personal property, of which he had the legal possession, to another, or from taking a legal obligation for the payment of the purchase money, during the continuance of the war.

A question as to who was the real owner of the property, and the note given for the purchase money, might have arisen between McKay and the Confederate States; but even that question could not have been raised by the appellees. Had McKay attempted to have run the property into a belligerent State, or have attempted to run the blockade with it; or even had he attempted to sell it to a citizen of Illinois, he might then have been chargeable with an illicit or treasonable commerce, and then the doctrine announced in the Prize Cases in 2 Black, or in Coppell v. Hall, 7 Wallace, might have been applied; but we are unable to discover the application of either of those decisions to the case at bar. Again, had the Confederate States succeeded in their attempt to establish an independent government, then the appellants might have been forever debarred from a recovery of their property, or the value thereof; but the Confederacy having failed, their rights in Texas, which were suspended during the war, revived, and they had a right to pursue their property, and the proceeds thereof, wherever they could find

it. If the sale was made after the non-intercourse act of Congress, they certainly could not have made it, being in the State of Illinois; and as they could have no agent in Texas after that act, they are not chargeable with an illegal sale. But if McKay had property of theirs in his hands on the passage of that non-intercourse act, though he could not control or dispose of it as their agent, yet he may, and should, be regarded as holding it in trust for their benefit, and his contract of sale may now be enforced by them.

Had the property been taken from McKay by the Confederate States during the war, and consumed or destroyed, in such case the appellants would have been without recourse; but it was sold to an individual, possibly without appellants' knowledge or consent. When the purchaser gave his note for the purchase money, that note, both in law and equity, became the property of appellants, and they now have the right to enforce the payment. There are no questions of equities of third parties having arisen since the making of the note; and though the same is, in terms, payable to McKay, yet it is in proof that he never claimed the ownership of the note, or the property for the purchase money of which the note was given, while the ownership is clearly established to be in appellants.

The defense, that the note had been confiscated and paid to the Confederate States, or its agent, cannot now be considered available for any purpose. That defense was fully considered by this court in Luter v. Hunter, 30 Texas, 590, and in Levison v. Norris, 30 Texas, 713, and again in Levison v. Krohne, 30 Texas, 714, and finally decided and settled, that payment to a Confederate States Receiver did not discharge the debt.

Under this view of the law of this case we must decide that the court erred in its instructions to the jury, upon a

very material question, and that the erroneous ruling may and probably did mislead the jury. And for this cause the judgment is reversed and the cause remanded, to be proceeded with in accordance with this opinion.

REVERSED AND REMANDED.

J. M. NESBITT, ADM'R, V. A. E. WALTERS ET AL.

1. Parties have a right to a reasonable time for the presentation of the facts to the jury, as well as to comment on those facts, and an arbitrary disregard of these rights by the District Court will, on appeal, be ground of reversal.
2. Ten minutes time *held* an unreasonable limit in this case.
3. It is the duty of the district judge to submit to the jury *the issues* made by the pleadings; and in this case *held*, that where the pleadings showed that the title to land was in controversy, as well as damages, it was error to fail to submit the question of title, and to limit the jury to the question of damages.
4. A claim for improvements made in good faith will not be sustained by proof of mistake as to the boundary lines of the land claimed, unless carelessness be excluded.

APPEAL from Hood. Tried below before the Hon. Charles Soward.

The facts sufficiently appear in the opinion of the court.

F. H. Sleeper, for appellant.

A. J. Hood, for appellees.

OGDEN, P. J.—On the trial of this cause, after the evidence had been closed, the court of its own motion limited the counsel for plaintiff and defendants to ten minutes in which to present their cause to the jury. This was such an error as will require a reversal of the judgment.

Parties litigant have a right to be heard, by themselves or counsel, and no person shall be deprived of any rights or privileges excepting by due course of law. We think the court in this case attempted to abridge one of the fundamental rights of every citizen, and which we have no right to overlook.

Upon all trials, whether civil or criminal, it is the province and duty of the court to determine all questions of law which properly arise, and to exercise a sound discretion in permitting argument by counsel; but parties have a right to a reasonable time for the presentation of the facts to the jury, as well as a reasonable time to comment on those facts, and to draw therefrom what they may consider the natural and legitimate deductions. What time would be reasonable and proper must depend very much upon the nature of the case, and the facts to be presented, but we think it not subject to the arbitrary dictation of the court or judge. It is true that when an argument has occupied a sufficient time to be fully presented to a jury, and when parties or counsel appear to be laboring to trespass upon and occupy the valuable time of the court, there is and ought to be a discretionary authority in the court to put a stop to useless and impertinent arguments; but that discretion should rarely be exercised, excepting when demanded by considerations of the greatest public good. The actions of the District Court in this respect, like most other acts, are subjects of revision; and whenever it is made to appear that the rights of parties may have suffered by the ill-advised or arbitrary exercise of that discretion, this court will never hesitate to interpose its corrective authority. We think the reasons given by the presiding judge wholly insufficient to authorize the action complained of, and that the limitation of time was erroneous.

This suit was originally brought by plaintiff in the form

of an action of trespass to try title, and for damages, but finally assumed the character of an action to settle a disputed boundary. Defendants below disclaimed all title to the land described in plaintiff's petition, but admitted that they, or at least one of them, had enclosed a portion of plaintiff's land in their farm, and had it, at the time of the institution of this suit, under cultivation. But there was a contest and disagreement between plaintiff and defendant, who owned land adjoining each other, where the division line run, and it appears that professional surveyors who had attempted to find and run the dividing line disagreed. The plaintiff prayed for a decree settling that question, and for a judgment for the rents and profits of that portion occupied by the defendants.

A surveyor was appointed by the court to run that line, but the court wholly failed to present any issue to the jury for the determination of that main question. This was error. The great object of suits at law or in equity is to settle disputes and adjust the rights of parties who come before the courts with their complaints. And yet the judgment of the court in this case does not pretend to settle the main issue between the parties, but simply attempts to settle the secondary demands for rents and improvements, without determining the quantity of land for which the plaintiff below was entitled to rent, nor how much improvements for which the defendants were entitled to a credit. These questions, then, were not properly presented; and as the court, at the instance of defendants' counsel, instructed the jury "that the only question for determination is, Has the plaintiff been damaged by the defendants, and, if so, how much?" we have failed to discover any issue whatever which was properly presented to the jury. Even counsel here widely disagree as to what were the real issues, and as to what should have been determined by the judgment of the court.

And as this cause will be reversed and sent back for a new trial, we deem it proper to indicate what, in our judgment, should have been determined in the court below, as the case is presented by the record.

The first and principal ground of complaint, and cause of this action, is the disputed boundary; and, second, the question of rents and damages. There is no evidence of damages, other than the use and occupation of the land, and that is covered in the demand for rent. We, therefore, conclude that the only demands made by the plaintiff were the settlement of the boundary line, and the rents; while the defendants, or rather one of them (since we can discover no cause of action against the two younger Walters), sets up an adverse boundary line, and a claim for improvements. These were all the questions which required determination, and all of which should have been settled by the judgment.

We deem it proper further to remark, in view of the peculiar instructions by the court, and the earnest claim by defendants for the value of the improvements put upon the land, that they cannot be regarded as possessors in good faith, such as would entitle them to a compensation for improvements, or to have their improvements offset as against the rents. They had no title, or color of title, to the land covered by plaintiff's patent, and claimed none. Indeed, it is in proof that the senior Walters, at the time of his purchase, knew, or was informed, that the field he was purchasing ran over upon the land of appellant. They are, therefore, no *bona fide* possessors, but must be regarded as mere trespassers, and as such entitled to no compensation for their improvements. (Dorn v. Dunham, 24 Texas, 380; Sartain v. Hamilton, 12 Texas, 222.) In this latter case the question now under consideration was directly presented, and the court says: "He does not claim on the ground of the nullity or defects of plaintiff's

title, but on a mistake of boundary. Now, this is a mistake for which the defendant can set up no sufficient justification, * * and he cannot justly claim, under such circumstances, to be a holder in good faith."

For the errors here indicated, the judgment of the District Court is reversed and the cause remanded, to be proceeded with in accordance with this opinion.

REVERSED AND REMANDED.

S. A. ROBERTS V. E. SACRA, GUARDIAN.

1. Guardian for minor heirs may sue on a promissory note payable to the ancestor of his wards on showing that they are the only heirs of the payee and no administration on his estate.
2. Defendant having pleaded in reconvention and asked affirmative action of the court against the wards of the plaintiff, will not be heard to deny the representative character of the plaintiff.
3. And in such pleadings the production of the note is sufficient evidence to entitle plaintiff to recover, and a demurrer to the evidence in such case should be overruled.

APPEAL from Fannin. Tried below before the Hon. W. H. Andrews.

This is an action upon a promissory note, executed by S. A. Roberts to E. M. Hudson, for fifteen hundred dollars. E. Sacra, the plaintiff, alleges the execution of said note, the death of Hudson, and that his only heirs are Sumner, Isaac, Frederick and William Hudson; that the plaintiff is their guardian, and that the note is due and unpaid, etc.

The defendant plead general denial; that Sacra was not guardian of said heirs (this plea not under oath); facts impeaching the consideration of the note; that the note was given for slaves, warranted to be slaves for life; that

said slaves have become free; and in reconvention setting up the damages from breach of warranty; also an account for legal services rendered by defendant for the ancestor of the minors, asking judgment in reconvention.

Upon the trial plaintiff read in evidence the note declared on, and closed.

The defendant demurred to the evidence; the plaintiff joined in demurrer, and the court thereupon rendered judgment for the defendant.

From the judgment appeal is taken by the plaintiff.

Joseph Bledsoe, for appellant, cited 13 Texas, 359, Booth v. Cotton; 1 Douglass, 218, Cost v. Berkbeck; 5 Johns., 1, Lewis v. Few; 1 Johns., 245, Patrick v. Hallett & Boone; 28 Texas, 623, Rector v. Duval; 1 Littell, 348, Middleton v. Commonwealth; 7 Monroe, 610, Peeble v. Porter; 12 Texas, 116, Cheatham v. Riddle; 12 Texas, 139, Clifton v. Tilley; 4 Texas, 338, Hopkins v. Donoho; 32 Texas, 188, Tobler v. Stubblefield; and 35 Texas, 761, Spann v. Glass.

Throckmorton & Brown, for appellee, cited 19 Texas, 172, Ross v. Smith; 32 Texas, 800, Howard v. Blythe.

WALKER, J.—The attorneys for both parties in this case appear to apprehend the reversal of the judgment, apparently leaving to us the only question, whether we will reform and render, or reverse and remand.

We prefer the latter. The appellee demurred to the appellant's evidence in the District Court, and the case went off upon this demurrer. The only questions properly before the court, then, were: Did the defendant owe the debt? and did the note sufficiently prove it? There was no question opened as to the pleadings, or the admissibility of the evidence. The defendant, in the court below, did not and could not controvert the right of the plaintiff

to recover, in his fiduciary capacity as the guardian of the minor children of E. M. Hudson, after he had filed his cross-action, praying for affirmative relief against the plaintiff in his fiduciary capacity. We think the District Court erred in sustaining the demurrer to the evidence. The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

THOMAS H. TURNER v. NANCY ROGERS.

1. Where land was held under continued possession and cultivation, by virtue of location and survey, for thirty years prior to entry by an adverse claimant,—*held*, that the right of entry to those laboring under no disability was tolled long before, and, under our law, the right of entry is not only tolled, but a right of action accrues to one who has been ousted of such possession.
2. A joint resolution by the Congress of the Republic directing the Commissioner of the General Land Office to issue patent upon a survey may be regarded a legislative grant to the owner of such survey.

APPEAL from Titus. Tried below before the Hon. J. D. McAdoo.

This was an action of trespass to try title, brought November 6, 1868, by the appellee and her husband against appellants.

On sixteenth of March, 1871, plaintiff recovered judgment, and the court overruling the motion for a new trial, defendant appealed to the Supreme Court.

The facts are sufficiently stated in the opinion of the court.

P. W. Gray, for appellants.—It is provided in the Constitution, Article 10, Section 2, that the residue of the public lands may be ascertained, it is declared that all

surveys of land heretofore made, and not returned to the General Land Office, in accordance with the provisions of an act entitled "An act concerning surveys of land," approved February 10, 1852, are hereby declared null and void. (Taylor v. Watkins, 26 Texas, 688; Yancy v. Norris, 27 Texas, 40; Hughes v. Lane, 6 Texas, 290; Jones v. Menard, 1 Texas, 771.)

The plaintiffs must recover on the strength of their own title. (Hughes v. Lane, 6 Texas, 290; King v. Elson, 30 Texas, 246; Adams on Ejectment.)

Moseley & Sparks, for appellee, cited the following authorities: Chiles v. Jones, 4 Dana, 578; Griffith v. Dickens, 2 B. Monroe, 386; Jackson v. Ottz, 8 Wendell, 440; Jackson v. Miller, 7 Cow., 751; Hortzapple v. Phillibaum, 4 Wash. C. C., 456; Lewis v. San Antonio, 7 Texas, 288; Taylor v. Watkins, 26 Texas, 688; Long v. Steiger, 8 Texas, 460; Gammage v. Trawick, 19 Texas, 64; Briscoe v. Bronaugh, 1 Texas, 340; Greenl. Ev., § 40; Wallace v. Maxwell, 1 Marshall's R., 447; Watts v. Johnson, 4 Texas, 319; Seward v. Hamilton, 19 Texas, 101; Madden v. Sheppard, 3 Texas, 50; Able v. Donley, 8 Texas, 336; 14 Howard R., 290; Magee v. Chadoin, 30 Texas, 660; Morris v. Byers, 14 Texas, 278.

WALKER, J.—The appellee and her husband, E. G. Rogers (since dead), brought this suit in the District Court against Turner & Hefner to quiet their title, and possession of the land in controversy. It is claimed in the assignment of errors that the petition is defective; whilst it alleges a title by grant from the government, it fails to give any notice of the present existence of such grant, and does not aver the loss of the same, or the record thereof.

This objection might, perhaps, be sustained if there

were not other facts alleged in the petition which, we think, are sufficient to support the claim of the appellees to the land. They hold the land under a survey made upon the headright certificate of Ensign B. Smith, and they aver that the Congress of the Republic of Texas, by a joint resolution, directed the Commissioner of the General Land Office to issue a patent upon this survey, and these are facts which appear beyond controversy. Smith's headright was located in 1839; the appellee holds under a continued possession and cultivation of the land for thirty years prior to the entry of the appellants. The right of entry to those laboring under no disability was certainly tolled long before the appellants entered upon the land; and under our law the right of entry is not only tolled, but a right of action accrues to one who has been ousted of such a possession. Our statute confers this right after ten years uninterrupted adverse possession. (Louis v. San Antonio, 7 Texas, 288.)

But we think the averments in the petition are sufficient to authorize the appellees in making proof of a grant, and there was no error in submitting this question to the jury. (Taylor v. Watkins, 26 Texas, 688.)

The facts in this case would authorize the presumption of a grant against the State. There was a survey under a certificate which, if defective in any wise, the Congress of the Republic made good by their joint resolution. This may be regarded as a legislative grant.

We might write a lengthy opinion in this case, but deem it totally unnecessary. The judgment of the District Court is affirmed.

AFFIRMED.

Statement of the case.

JOHN HITSON v. J. H. DILLAHUNTY.

1. In a suit by the legal owner of a promissory note for use of the administrator of an estate, the incapacity of the administrator to sue or to act in capacity of administrator cannot be pleaded in abatement.
2. Under Section 6 of act of May 23, 1871, an administrator against whom a motion has been made to compel a new bond has, notwithstanding the service of notice of such motion, the right to prosecute suit to final judgment, unless he had been finally removed from the administration.
3. Such administrator would not have authority to institute suit after such service of notice, but would have the right to prosecute suit or do any other act having for its direct object the saving the estate from loss or damage.

APPEAL from Palo Pinto. Tried below before the Hon. Charles Soward.

Appellee, for use of J. B. Henderson, administrator of W. W. Cochran, brought suit against John Hitson, the appellant, on a note executed by Hitson and assigned to appellee, and by appellee mortgaged to the said Henderson.

The defendant, on October 24, 1872, answered, a general denial.

On the twelfth of November, 1872, the defendant answered further, "That the plaintiff herein, for whose use the suit was brought, as administrator of the estate of W. W. Cochran, deceased, his action ought not to have and maintain, because he says that the said Dillahunty is only nominal plaintiff herein; that said J. B. Henderson is the real plaintiff herein as the administrator of said Cochran's estate; that on the fifteenth day of April, 1872, the defendant in this suit and A. G. Crawford, both of whom were sureties on said Henderson's bond as administrator as aforesaid, filed their petition in the District Court of Palo Pinto county to be released from their suretyship on said bond; and upon the filing of said pe-

tition citations issued thereon to said Henderson, and the same were served on him on the first day of May, 1872. * * * That no new bond has been filed by said Henderson, as required by law in such cases, and that his failure so to do suspended his powers as administrator as aforesaid, and that he can prosecute this suit no further."

To the amended answer the plaintiff excepted, because it was not filed in due order of pleading, and was not under oath.

A second amendment was then filed, in which defendant withdrew all his former pleas, and relied only upon his plea in abatement, which was in substance as above, and was supported by affidavit.

Exceptions were urged by the plaintiff to the amended plea, for want of sufficiency.

Which exceptions were sustained, and the answer struck out. Judgment by default was rendered for the amount of the note.

A motion for new trial was overruled. Appeal by the defendant. The error assigned is the action of the court in sustaining exceptions to the amended answer.

J. L. L. McCall; for appellant.

No brief for appellee.

OGDEN, P. J.—On the ninth of April appellee instituted this suit for the use of J. B. Henderson, administrator, against the appellant, on a promissory note. At the time of bringing the suit appellant and one Crawford were sureties on Henderson's administrator's bond, and on the fifteenth of April, six days after the filing of this suit in the District Court, both Hitson and Crawford applied to the probate court to be relieved as securities on Henderson's bond. Notice of this application was duly served

on Henderson in May, and in November appellant came into the District Court and plead these facts in bar to Henderson's right further to prosecute this suit. This plea, and an amendment setting up substantially the same facts, were, on motion of plaintiff below, stricken out by the court, and a judgment was rendered for plaintiff, from which judgment the defendant below has appealed.

It may be proper here to state that these pleas were filed out of due order of pleading in being filed after a plea to the merits, but this objection may not apply with equal force to the last amended plea of defendant below, since his plea to the merits had then been withdrawn; and it is now conceded by counsel for both appellant and appellee that the only matter to be determined by this court is a proper construction of the 6th Section of the act of May 23, 1871, in relation to probate matters, so far as the pleadings in this case refer thereto. And here we will say, that if Henderson himself had brought this suit as administrator, and upon notice to give a new bond he had failed to do so, yet, under the last clause of the statute referred to, he would have a right to prosecute this suit to final judgment, unless he had been finally removed from the administration by an order of the court. The statute does not suspend his powers to take any steps which he may deem necessary to preserve the property committed to his charge. The note sued on, if it belonged to the estate, was as much the property committed to his charge as any other property; and perhaps the only way to preserve its value was to prosecute the suit, without delay, to judgment. This certainly is the spirit and, we think, the letter of the statute referred to. Under that section, after failure to give bond, he may not have had power to bring a new suit, or to sell any property belonging to his estate, or to collect the debts due the same, but it

is believed he would be authorized in securing a doubtful debt, or doing any other act which had for its direct object the saving the estate from loss or damage.

But this suit was not brought by the administrator, but by another person for the use of the estate, and it would make no difference to the estate whether Henderson's authority had been suspended or not. He was still administrator, and the suit might well have been prosecuted to judgment even in his name. There was no error in the order of the lower court in sustaining the exceptions to defendant's original and amended plea, and in striking out the same. The judgment of the District Court is affirmed.

AFFIRMED.

T. B. OWENS v. THOMAS W. MITCHELL ET AL.

1. The estate of minors goes into their hands subject to all liabilities incurred by their guardian in managing such property.
2. Suit was properly brought against the guardian, who incurred the liability, and against his wards after they have received their property; and especially has plaintiff such right upon showing the insolvency of the guardian.
3. It is not necessary that accounts for expenses necessary in the management of the estate of a minor, incurred by the guardian, be presented for allowance authenticated as claims presented to an administrator.

ERROR from Fort Bend. Tried below before the Hon. L. Lindsay.

To the September term, 1868, appellant brought suit against Thomas W. Mitchell and Mason and Wm. Briscoe, alleging that for five years next preceding Mitchell had been the guardian of the persons and property of the Briscoes; that said minors owned a large plantation, under the control of their guardian; that for the successful

cultivation of said plantation it became necessary to employ a skillful overseer or manager; that for said purpose he employed plaintiff, in 1862; for which services plaintiff was to have reasonable compensation; that plaintiff performed said labor in a faithful and skillful manner, for four years; at expiration of which time plaintiff and said Mitchell accounted, and it was ascertained and agreed that said Briscoes were indebted to plaintiff in the sum of one thousand dollars coin; that no part of said sum had been paid; that Mitchell is insolvent; asking a decree against the said property of said minors, etc.

Mitchell made no defense.

The Briscoes pleaded in abatement that the District Court had no jurisdiction; that the claim should properly have been enforced through the county court, sitting for probate business.

The Briscoes further excepted to the petition for misjoinder of parties; want of bill of items; that the account did not appear to have been presented to the guardian for allowance, and rejected. They also answered by general denial, and in avoidance.

October, 1868, the court sustained the exceptions, and dismissed the suit as against the Briscoes. From this judgment an appeal was taken, and was dismissed (33 Texas, 226), there being no final judgment.

February 18, 1871, judgment final was rendered against Mitchell for $814.

The case is brought by writ of error again to this court by the plaintiff.

The errors assigned are:

1. Sustaining the demurrer of the defendants Briscoe to the petition.

2. Dismissing the suit as to the defendants Briscoe, upon the demurrer.

3. Forcing plaintiff to take final judgment against

Mitchell personally, when his prayer was for judgment against the estate of the Briscoes.

P. E. Pearson, for plaintiff in error, cited 2 Story's Eq., §§ 1251, 1250; 22 Texas, 347, Young v. Smith; 21 Texas, 801, Caldwell v. Young & Morgan; 25 Texas, 771, Price v. McIver; 27 Texas, 259, Hastings v. Bachelor; Pas. Dig., Arts. 3903, 1311, 1349, 1810; 7 Texas, 51, 52, Harrison v. Knight; Sayles' Probate Law, § 370.

No brief for defendant in error.

WALKER, J.—The plaintiff in error in this case brought his suit against the defendant in error and his wards, Mason and Wm. Briscoe. He sues upon an account stated between himself and the defendants, for work and labor.

The petition sets out a liability against the estate of the Briscoes.

Under an order of the county court Mitchell was carrying on a plantation for the benefit of his wards, and hired the plaintiff as overseer. He might have paid the overseer his wages as one of the necessary expenses, in managing the estate, without proof of the account, further than as to the correctness of the items. There was no necessity for the statutory proof required as to accounts presented for allowance to administrators. The services were rendered under a contract with him as the guardian of the Briscoes' estate—it may be said in pursuance of his authority from the probate court to carry on the plantation.

Mitchell's insolvency is set up in the petition, and the plaintiff claims a judgment that shall bind the estate of the Briscoes, which they resist; but upon what ground of equity they should resist the payment of this debt, we are unable to discover. They are trustees of the estate lately held and managed for them by their guardian for

all just creditors who have valid claims against the guardian in his fiduciary capacity (2 Story's Eq., 687), and the property is ultimately liable if the guardian failed to pay it. If, then, as is alleged, the guardian is insolvent, and the claim is a just one, and the estate has passed into the hands of the Briscoes themselves, their guardian being discharged from his trust, they are bound to pay it.

If, on the other hand, Mitchell is still their guardian, and there are assets remaining in his hands, the judgment already against Mitchell should be paid out of such assets.

A court of equity will not allow parties, who are liable for a debt, to shirk and avoid its payment by technical objections, when all parties to be affected by the decree are properly before the court. If in such case the law, technically administered, furnishes no proper remedy, it is the peculiar province of equity to find one.

We think the court erred in sustaining the demurrer, and dismissing the Briscoes from the record.

The facts may show, as set up under the special answers of the Briscoes, that the services rendered by Owen are not properly chargeable against them; if so, upon the finding of a jury the court will be at no loss to enter the proper decree.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

F. W. CHANDLER ET AL. v. JOSEPH C. RUSHING.

1. For possession of land to be made available, under the plea of limitation, it must be an unbroken possession for the full period.
2. If possession of land be broken before the period necessary to give limitation to a defendant is complete, it requires no privity in blood or estate between the plaintiff and the one who ousted the possession of defendant, to give the former the advantage of the ouster.

3. He who is in possession of land with improvements and enclosures holds actual possession of that portion within his enclosures; but if, at the same time, he holds under a deed, the deed gives him constructive possession of all the land embraced in the deed.
4. When one ceases to have actual possession of land, by sale of the improved portion, or otherwise, he loses his constructive possession of the remainder.

APPEAL from Ellis. Tried below before the Hon. Hardin Hart.

This appeal is from the judgment of the court on demurrer. The opinion discloses the character of the plea.

James B. Morris, for appellant, cited Jackson v. Leonard, 9 Cowen R., 653; Brandt v. Ogden, 1 Johns. R., 159; Doe v. Campbell, 10 Johns., 447; 25 Wend., 316; 9 Texas, 337; 1 Marsh. Ky. R., 106; Id., 366; Barr v. Gratz, 4 Wheat. R., 213-223.

Amzi Bradshaw, for appellee.—The action in the case of Wright v. Godard cannot benefit appellant, because the text says: "The interruption of the use of a thing is natural or civil. The natural takes place when the owner" (not Wright v. Godard) "enters into the land and turns out the possessor before he acquires a right by prescription. But the effort of civil interruption, or interruption in law, is not general, but relative, etc. The obligations towards the claimant, however, cannot produce any legal effect, with respect to other persons. Besides, *lex civilis vigilantibus scripta est;* and while the claimant must not be deprived of the benefit of his vigilance and activity which enabled him to claim before the right acquired by prescription was completed against him, there is no reason why his vigilance should benefit others who were not so vigilant." (Bouvier's Institute, Vol. 2, 486, 487.)

Minority of one heir does not save the interest of the

adult heirs. Because the statute of limitations does not run against a *feme covert* is no reason why it should not run against a *feme sole*, although there is privity between them. Your honors will discover that defendant has plead a complete bar before Wright sued Godard, and their five, ten and twenty years limitation.

We do not claim under or by virtue of Wright's possession, as appellant would have you believe.

Plaintiff's replication, in which he sets up Wright's suit, is in the nature of a plea in confession and avoidance, and I submit that said plea is not good upon demurrer. The plea does not sufficiently describe the parties, nor the subject matter, nor the judgment of the court. For aught the court can know, the judgment has been appealed from, and will be reversed and remanded or reformed.

WALKER, J.—This suit was commenced by a petition for injunction; the injunction was granted, but afterwards dissolved on motion, and by the pleadings the action was changed to that of trespass to try title.

The appellee claims through mesne conveyances under a patent to Francis Slaughter, the assignee of Edward Faris.

The title is set out by the appellee as from G. W. Hill, the executor of Slaughter's will, to Lucy Faris, who deeded to Lewis Godard; from Godard to Baker; from Baker to Jane Godard; from her to Jane Wilson.

The appellee also relies upon possession from 1852 to 1865, and pleads the three, five and ten years statutes of limitation.

The appellants filed a replication to these pleas, which denies the possession of the appellee, and those under whom he claims, to have been peaceable and continuous; and the replication avers that on August 29, 1851, one

B. F. Wright sued Louis Godard, the husband of Jane, and head of the family, in the District Court of Ellis county, for the recovery of the possession and title to one thousand acres of land, part of the Slaughter league, and covering the land sued for.

And that in pursuance of the proceedings herein had, on the twenty-sixth of April, 1854, Wright obtained a judgment against the administrator of Louis Godard's estate *et al.* for the recovery of one thousand acres of land; that the writ of possession issued, and that in the year 1856 the estate of Louis Godard, and Jane Godard, the surviving wife, were actually dispossessed of this thousand acres of land, which covers nearly the entire lands here in controversy.

On the seventh of May, 1872, the day on which the replication was filed, the appellee demurred to it, both generally and specially.

The special demurrer reads as follows:

"And for special exceptions herein defendant says, that if it is true that B. F. Wright did institute suit against D. S. Godard at the time and place mentioned in said amended petition of plaintiffs, said amended petition is insufficient, in this:

"It does not aver that said Wright claimed title through plaintiffs, or their assignees; neither is it shown that said Wright was privy in blood or estate, with either of the plaintiffs or their assignees, at the time of the institution of said suit; and of this he prays judgment of the court."

The court overruled the general demurrer, but sustained the special, and ruled out the plaintiffs' replication.

There can be no doubt of the error herein committed, no matter by whom the possession of the appellee, or those under whom he claims, was broken; if broken at all, it required no privity in blood or estate between the

appellants and the party who ousted the possession of the appellee to give the appellants the advantage of it.

We cannot help thinking the honorable district judge, before whom the case was tried, must have had in his mind the law which applied to the demurrant. It was certainly necessary that Rushing, the appellee, should show a privity of blood or estate between himself and those under whom he claimed, down from the Slaughter patent; but the principle does not apply to the appellants.

Another question presents itself in this case:

Tyler says, in his work on Ejectment and Adverse Enjoyment: "Adverse possession, to bar an entry, must be confined to the particular parcel occupied; and it must appear that the continuity of possession, during the whole period, is applicable to such parcel." (Tyler, 912.)

All that is requisite in order to make an adverse possession effectual for the statutory period by successive persons, is that the succession be continued by an unbroken chain of privity between the adverse possessors.

Where one entered, and then another claimed adversely to him, and took possession under such claim by consent of the first possessor, pursuant to a compromise between them, it was held that this was not a continuity of the first possession, within the rule which requires privity between the successive possessors. (Jackson v. Leonard, 9 Cowen, 653; see also Brandt v. Ogden, 1 Johns., 159; Doe v. Campbell, 10 Johns., 477; Simpson v. Downing, 23 Wend., 316.)

These authorities are cited in appellant's brief, to which many more might be added. The case of Wheeler v. Moody, 9 Texas, 377, is a well reasoned case. In the opinion, Mr. Justice Wheeler remarks: "The possession, to be effectual, either to prevent a recovery or vest a right under the statute, must be an actual possession,

attended with a manifest intention to hold and continue it."

It must be, in the language of the authorities, an actual continued adverse and exclusive possession.

Some questions may arise as to the sufficiency of the replication, in that it avers that Godard's possession was ousted by Wright to almost the entire tract of land claimed by the appellee. The sufficiency of this replication as a mere pleading cannot be doubted, but how far it may avail the plaintiffs must be tested by the facts. We again quote from Tyler, on page 911, a doctrine which is familiarly recognized in our own reports:

"If the possession is under color of title, then an actual possession and occupation of a part of the parcel claimed, and a constructive possession of the residue, must continue uninterruptedly for the whole period prescribed." (See Gillespie *et al.* v. Jones *et al.*, 26 Texas, 343.)

In Cunningham v. Frantzen *et al.*, 26 Texas, 34, the court lays down certain rules of construction and law, which may become applicable in the further progress of this case—as there may be some doubt whether Wright's recovery of one thousand acres of the Slaughter league does cut off the appellee from all claim to any part of this land, under the statute of limitations.

The principle may be restated here. He who is in possession of land, with improvements and enclosures, holds actual possession of that portion of the land embraced within his enclosures; but if, at the same time, he holds under a deed, the deed gives him constructive possession of all the land embraced in the deed. And now, if a party sell a part of his tract, which includes his improvements, by deed, with defined boundaries, and the purchaser take possession under the deed, he will have neither actual nor constructive possession of any portion of the land not embraced within the boundaries of his deed,

and he will not succeed to the constructive possession of the whole tract. The constructive possession, it will be seen, depends upon the actual; and the vendor having parted with that over which he had actual possession, loses his constructive possession of the remainder, unless he take actual possession now of that which he before had only a constructive possession. (See Clark v. Courtney, 5 Peters, 354; Green v. Liter, 3 Peters' Cond. Rep., 97, 107.)

It is, perhaps, unnecessary to explain the law of this case further.

The judgment of the District Court will be reversed and the cause remanded.

REVERSED AND REMANDED.

BENJAMIN F. HARDIN v. THE STATE OF TEXAS. GEORGE POAG v. THE STATE OF TEXAS.

The Legislature has power to authorize the holding of special terms of District Courts, for the trial of criminal causes.

APPEAL from McLennan. Tried below before the Hon. J. H. Banton.

These were proceedings by *habeas corpus*, on the part of B. F. Hardin and George Poag, who were convicted at a special term of the District Court of McLennan county, held in July, 1873, and their punishment assessed at fine and imprisonment. The term of court at which the convictions were obtained was held under an act of the Legislature, entitled "An act to authorize the judge of the Thirty-third Judicial District to hold a special term of the District Court for the trial of criminal causes," approved June 4, 1873.

Upon hearing, the parties were remanded to custody by the district judge, and they appealed.

No briefs on file.

WALKER, J.—The point raised in these cases, we think, is determined in the 1st Section of the 5th Article of the Constitution, which reads as follows:

"The judicial power of this State shall be vested in one Supreme Court, in District Courts, and in such inferior courts and magistrates as may be created by this Constitution, or by the Legislature under its authority.

"The Legislature may establish criminal courts in the principal cities within the State, with such criminal jurisdiction, co-extensive with the limits of the county wherein such city may be situated, and under such regulations as may be prescribed by law; and the judge thereof may preside over the courts of one or more cities, as the Legislature may direct."

Had, then, the Legislature power under this Constitution to authorize the Criminal Court of McLennan county to hold an extra term, so-called?

The language of the article quoted leaves the jurisdiction and regulation of this court to the Legislature, and, in our opinion, in no way restricts the power to inhibit the Legislature providing for as many terms of these criminal courts as they may think proper; and it is a wise provision that these courts may be held more frequently than the other District Courts, as great expense in the keeping of prisoners may be avoided by such a regulation.

But we are referred in the brief of appellants' counsel to Section 6 of Article 5 of Constitution, and it would seem that learned counsel hold that the question herein presented must be determined under this section. It is

true that as a general rule of interpretation where there is an express power conferred upon the Legislature there can be no implied power.

But this section applies to the ordinary District Courts, and it is even questionable whether the language of this section means any more than that the court shall be held at least three times a year in each county embraced in a judicial district.

The language of the Constitution makes it obligatory upon the district judges thus often to hold their courts; but this question has been settled in some of the other States, under similar constitutional provisions, as not prohibiting the judges from holding their courts oftener if necessary.

This is a question scarcely referable to the jurisdiction of the court; that is fixed by positive law. (7th Section of the 6th Article of Constitution.) This is a question which more properly regards the administration of the court, and is a matter which, to say the least, would be very properly referred to the Legislature by the organic law; and it cannot be denied that one of the leading vices in constitution making is too strong a disposition to legislate on all conceivable subjects, taking from the Legislature the very right and power to legislate for the people upon such subjects, and in such manner as public necessity may from time to time require.

The judgments in these cases are affirmed.

AFFIRMED.

JAMES BAIRD v. THE STATE OF TEXAS.

1. The permission given by the law for one to bear arms "on his or her own premises, or at his or her own place of business," will not authorize the carrying of deadly weapons in the woods while hunting stock.

2. The "place of business" contemplated by the act has reference to some particular locality, appropriated exclusively to a local business; such as the farm, the store, the shop, or dwelling place.
3. Unless it appear affirmatively from the record that the jury was sworn on the trial in the court below, the judgment will be reversed.

APPEAL from Polk. Tried below before the Hon. Henry C. Pedigo.

James E. Hill, for appellant.

Attorney-General, for the State.

OGDEN, P. J.—There appears to be no controversy about the facts of this case, which are briefly as follows: The appellant, in December, 1872, was out in the woods, with two of his neighbors, hunting hogs; and during the day, and while out in the woods, the appellant drew from a scabbard beneath his coat a pistol, and dried it by the fire, and then put it back in the scabbard.

The only question for determination now is, do the foregoing facts establish a violation of the act of April 12, 1871, entitled "An Act to regulate the keeping and bearing of deadly weapons." The constitutionality of that act being admitted, its beneficial effects upon society have been quite fully demonstrated and placed almost beyond question. But while it is generally conceded that the execution of that law, in the spirit, and for the purposes intended by the law-making power, would greatly conduce to the peace and quiet of the citizens of the State, yet it must also be admitted that any attempt to prostitute that law from the purposes for which it was enacted into an instrument of oppression to annoy and harass any peaceful and law-abiding citizen, would greatly tend to bring that law into disfavor, and create and stimulate a demand for its repeal. It is, therefore, but just and reasonable that this law, as well as all others, should be

executed in the spirit intended, for the good of the citizens generally, and not as a snare to entrap the unwary who intend no wrong, and believe they are exercising only their legitimate or inalienable rights.

But it should be remembered that no human law enacted for the government of society can be so perfect as not to work a real or apparent injury or wrong to some one individual, and when such a case arises every good citizen should cheerfully submit to a faithful execution of a beneficial law, notwithstanding it becomes a seeming hardship upon him.

The indictment in this case is clearly sufficient to charge the offense intended, and clearly charges a violation of the statute, and we have failed to discover the defects complained of in the general terms used.

The appellant claims that when "seen with a pistol he was in the woods where he usually hunted hogs every winter or fall, and that therefore those woods were his place of business, and that he had a right under the statute to carry a pistol in the woods while hunting hogs." We think the Legislature never intended that so general and extended an interpretation should be placed upon the phrase, "at his or her own place of business;" for if such be the construction, then every man could very plausibly set up the right to keep and bear arms on every occasion, for he could always claim to be at his own business, whether hunting hogs or cattle, or whether going from one neighbor or town to another; and even he who makes it a business to appropriate other people's property to his own use, might claim the right to bear arms to protect that business. Such was clearly not the legislative intent, nor was it the legislative intent to include in the phrase "on his or her own premises," wild and uninclosed timber or prairie lands, wholly detached from an enclosed field or premises. The place of busi-

ness contemplated by the law evidently has reference to a particular locality, appropriated exclusively to a local business, such as the farm, the store, the shop, or dwelling place, and the business such only as is usually carried on upon that farm, in the store or shop, or other appropriated local place. The woods or prairie, or even the public roads, can in no proper sense be termed any man's place of business, since he has no right to an exclusive appropriation. We are therefore clearly of the opinion that hunting hogs in a wild and uninclosed country, or portion of the country, not such a place as would entitle a man to carry a pistol upon his person.

But it is contended that the prosecution failed in not proving that the woods in which appellant hunted hogs was not his own premises. The statute, in the first clause of the first section, prohibits all persons from having about their person certain specified weapons, but adds a proviso in favor of certain individuals; and if a party wishes to claim the benefit of the proviso, he must avail himself of it as a matter of defense.

The fact that a person has the right to bear arms is peculiarly within his own knowledge and power of proof; whereas it might be extremely difficult, and oftentimes impossible, for the State to prove the negative. It would be absurd to say that the State, in order to sustain this prosecution, should prove that the woods where appellant hunted hogs were not his premises, since no one but appellant himself would be likely to know that fact so as to swear to it; but it would have been very easy for appellant to establish the fact of ownership, if true. But there is a material error in the judgment of the lower court, as appears from the transcript of the record. In Nels v. The State it is said: "It nowhere appears of record that the jury who tried the prisoner were sworn. This, in our opinion, is a fatal defect in the record of con-

viction." In the case at bar it does not appear affirmatively from the record that the jury were sworn, and upon the authority referred to, supported by all elementary writers, we must hold the judgment fatally defective, and for this reason the judgment is reversed and the cause remanded for further proceedings.

REVERSED AND REMANDED.

CORA MORRIS v. THE STATE OF TEXAS.
MOLLIE WILLIAMS v. THE STATE OF TEXAS.

Proof by general reputation in the community that a house is kept for public prostitution is sufficient to sustain a prosecution for keeping a disorderly house.

APPEAL from Galveston. Tried below before the Hon. Sam. Dodge.

The defendants were each separately indicted for keeping a house for the purpose of public prostitution.

On the trial twenty witnesses testified to the reputation of the houses kept by the defendants; that it was bad, and had the general reputation of being kept as houses of public prostitution.

Verdict of guilty, with fine of $100 in one case and $200 in the other. Motion for new trial overruled, and defendants appealed.

No brief for either appellant.

Attorney-General, for the State.

WALKER, J.—These cases are submitted together, and what we have to say in the one will apply to both. We think the proof of the character of a house which has

become notorious in a city, by general reputation, is sufficient to establish the character of the house; and it is the character which the house bears in the community which forms the subject of inquiry.

The appellants in these cases can take nothing from the bills of exceptions; they had everything to gain, and nothing to lose, by the ruling of the court; and the court ruled correctly, that the witnesses were not bound to answer the question if it would degrade them. When they declined answering the question, taking refuge behind their privilege, it is very evident that if the court had compelled them to answer, the answers would have been damaging to the appellant.

The judgments of the District Court are affirmed.

AFFIRMED.

HENRY BOYNTON ET AL. V. D. T. CHAMBERLAIN ET AL.

1. In a suit by publication against non-resident defendants, the omission to give the Christian name of one of the defendants *held* to be error.
2. In a suit upon an account, a petition failing to contain a bill of particulars, does not set out the plaintiff's cause of action in a clear and intelligible manner, and is defective.
3. It seems that in the statement of facts required, where judgment is rendered upon citation by publication, it should appear that depositions used in evidence were regularly taken.

ERROR from Bell. Tried below before the Hon. J. P. Osterhout.

This is a suit upon an account, brought by H. J. & D. T. Chamberlain against Henry Boynton and —— Cushing.

The petition contained no bill of items, but referred to "an account herewith filed as a part of this petition,

marked 'Exhibit A,' with leave to refer thereto whenever and as often as necessary."

The petition was filed thirteenth of January, 1870. Writs of attachment and garnishment, and citation for publication, were issued thirteenth of January, 1870, describing the defendants as in the petition.

The citation was served by publication prior to fifteenth of February, 1870.

Exhibit A, the bill of items, was filed June 14, 1870.

The trial was *ex parte*, and judgment for plaintiffs.

In the statement of facts it appears that the depositions of certain witnesses were taken after notice published for four successive weeks.

The evidence of such publication is the affidavit of J. H. Davenport, publisher of the Belton *Journal*, sworn to before a justice of the peace.

The defendants, by writ of error, seek a revision of this case.

Gray & Botts and *E. M. Pease*, for plaintiffs in error.

No brief for defendants in error.

WALKER, J.—There are some eleven assignments for error in this case, some of which, we think, are well taken.

The Christian name of the defendant Cushing is not set out in the pleadings or process. This is not in accordance with the statute. (Art. 1427, Pas. Dig.)

There is no bill of particulars filed with the petition, nor does any bill appear with the pleadings until after the return day of process.

The petition does refer to an account marked "Exhibit A." This "Exhibit A" was not filed with the petition. In a word, it may be said, the petition does not set out the plaintiffs' cause of action in a plain and intelligible manner.

Syllabus.

Certain depositions were taken *ex parte*. The record does not contain the certificate of the clerk—the proper certificate to the publication of the notice required by law.

If these depositions had been correctly taken, they do not prove the plaintiffs' cause of action; nor does it appear, from the statement of facts, that there was any other testimony offered.

We will not follow the learned counsel in their brief to examine all the assignments of error, but, for the reasons assigned, reverse and remand the case.

REVERSED AND REMANDED.

38 606
74 606

WILLIAM R. JOHNSON ET AL. v. A. BYLER.

1. In trespass to try title, either a legal or equitable defense, which amounts to an estoppel, may be offered in evidence without being specially plead.
2. Legal estoppels exclude evidence of the truth and equity of the particular case, to support a strict rule of law on grounds of public policy.
3. Equitable estoppels are admitted on the ground of promoting the equity and justice of the particular case, by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.
4. Equitable estoppels are entitled to a fair and liberal application, like other equitable doctrines, which are admitted to suppress fraud and promote honesty and fair dealing.
5. A party is estopped whenever he has gained an undue advantage, and has caused his adversary a loss or injury.
6. One who has caused the making of an illegal contract by others cannot have the same set aside to benefit himself, to the injury of the contracting parties.
7. The courts will not disturb executed contracts, nor compel specific performance of executory contracts made for Confederate money.

APPEAL from Caldwell. Tried below before the Hon. Henry Maney.

Statement of the case.

On the twentieth day of November, 1857, the appellee sold the land in controversy to P. A. and Martha R. Swan for the sum of $2525, which was evidenced by three promissory notes for $875 each, dated November 20, 1857, and due at one, two and three years. Appellee and the Swans lived in Guadalupe county when the trade was made. Appellee made to the Swans a deed with full covenants of warranty to the land, reciting that the notes were the consideration of the sale, and stating the respective dates at which the same were to be due.

Immediately after the sale and conveyance from appellee to the Swans in 1857, they moved upon, and took possession of the land. On the fifteenth day of December, 1862, for the sum of $3750, the Swans sold and conveyed the same land to appellants, making them a fee simple deed to, and putting them in the possession of the same. This sale was made for Confederate money, and at the instance and by the direction of the appellee, for the purpose of paying off a balance due on his notes by the Swans.

February, 1866, appellee, who had removed to, and was then a resident of Fayette county, filed a suit in the District Court of Caldwell county, against the Swans, for the balance of the purchase money which he alleged to be due on their notes to him, and in his petition prayed for a foreclosure of his vendor's lien upon the tract of land. Appellants were not made parties to this suit. The venue in the case was changed, and the cause removed to the District Court of Gonzales county.

October, 1868, the cause in the Gonzales court was tried, and on a finding of the jury, that the notes were given for the land, a foreclosure was decreed, and an order of sale issued the first day of December, 1868.

January, 1869, the deputy sheriff of Caldwell county sold the land in obedience to the order of sale, at which sale appellee became the purchaser for the sum of $710,

and by virtue of and in pursuance of the sale made by order of the District Court of Gonzales county, conveyed by deed the land to appellee.

On the tenth day of March, 1869, appellee brought his action of trespass to try title against appellants in the District Court of Caldwell county.

April, 1872, a jury was waived, and the cause submitted to the court, which resulted in a judgment for appellee against the appellants for the land, and also for the sum of eight hundred and thirty-four dollars and seventy-five cents, for the excess of the rents of said land over and above the value of improvements made by appellants, and for all costs of suit. To this judgment appellants excepted, and gave notice of appeal.

J. H. Burts, *T. M. Harwood*, and *A. M. Jackson*, for appellants.

L. J. Story, for appellee, contended that there was no estoppel, and cited Martin v. Wellerbock, 38 Cal., 300; 18 Ohio, 41; 2 Daly's N. Y., 325; Hendricks v. Snedicker, 30 Texas, 304.

James F. Miller, also for appellee.

WALKER, J.—We disposed of the case of Jones v. Huff at the last term of this court, and we have nothing now to do with it except to express the hope that we may be indulged in the vanity of congratulating ourselves that both parties acquiesce in the decision, and claim something under it to help them out in the present case.

We think, however, that this case must stand or fall by its own merits.

In the fall of 1857 the appellee sold the land in controversy, on deferred payments, to P. A. and Martha R. Swan. The vendor's lien was reserved to secure the

notes, which matured in one, two and three years; and were all due in 1862, when Byler called upon Swan for payment. It does not appear precisely what amounts had been paid on these notes.

The Swans went into possession of the land, cultivated and improved, until the fifteenth day of December, 1862, when they sold the land to the appellants for $3750 in Confederate money. The facts touching this sale are of grave importance in the decision of this case. We have them set forth in the bill of exceptions, as they were not permitted to go to the jury.

This is an action of trespass to try title, in which the plaintiff—the appellee in this court—sets up a title to the land, derived as follows: In 1866 he had brought a suit in the District Court against the Swans, his vendees, asking a personal judgment and a decree foreclosing his vendor's lien.

The appellants were not parties to this suit, and, we may as well say here, are not bound by it. Yet, if the equity of redemption passed to them under their deed from the Swans, they must necessarily have been made parties, or the equity would not be foreclosed. But we will refer to this again. The venue having been changed to Gonzales county, at the Fall Term of the court, 1868, Byler obtained a judgment against the Swans, and a decree to sell under the vendor's lien.

The land was sold on the first Tuesday of January, and purchased by the appellee, for the sum of $710. The sheriff executed a deed to the purchaser, and at the March Term of the District Court of Caldwell county, for the year 1869, the appellee brought this suit against the appellants, which has resulted in a judgment in his favor, dispossessing the appellants of the land.

No further notice need be taken of the chain of title set up by either party.

We now propose to examine the bills of exception and the evidence which the court ruled out.

The appellants propose to prove, by the evidence of P. A. Swan and other witnesses, that in the fall of 1862, some four weeks previous to the sale from the Swans to the appellants, Byler called upon the Swans for payment of his notes; that Swan told him he had no money by him with which to pay the notes, but that he could sell the land for Confederate money, which he would do provided he (Byler) would receive *that* money in payment of the notes which he held against the land; that he would prefer not doing so, as the land would always be worth the money due against it. To this, it is claimed that Byler answered, he would receive the Confederate money in payment of his notes, and desired that the land might be sold in order that he might do so.

The Swans sold, as before stated, for the sum of $3750 Confederate money, and within four weeks from the date of Byler's visit, when P. A. Swan swears that he tendered Byler the money, and he refused to accept it. These statements constitute the evidence ruled out by the district judge.

The judge gives his reasons for ruling out this evidence in the bills of exception. They are as follows:

First—Because there was no pleading to authorize the introduction of such evidence.

Second—Because the contract attempted to be proven was an illegal contract.

Third—Because there was no consideration for the contract.

Fourth—Because it was an attempt to attack the judgment of the District Court of Gonzales county collaterally, by parol, in the case of Byler v. Swan *et al.*

As to the first of these objections the action was trespass to try title, and there was a plea of a general issue, and

under this plea we believe it is now settled doctrine, that either a legal or equitable defense, which amounts to an estoppel, may be offered without being especially plead.

In the case of Horn v. Cole, decided by the Supreme Court of New Hampshire, and reported in the May number of the American Law Register for 1873, Chief Justice Perley, speaking of legal estoppels, says: Whether by deed or record, or matter *in pais*—for certain reasons already stated—because legal estoppels shut out proof of the truth and justice of individual cases, they have been called ODIOUS, and have been construed with much strictness against parties that set them up. They were formerly required, like other defenses regarded as inequitable, to be pleaded with certainty, to a certain intent, in every particular. If they were relied on by way of averment, and tried by the jury, the jury might find, and according to some authorities were bound by their oath, *veritatim dicere*, to find according to the truth of the case, regardless of the estoppel. (Trials *per pais*, 284; Co. Lit., *227a;* Com. Dig., Estoppel, § 5.) The practice is now different, and legal estoppels may be relied on, when given in evidence, without being specially pleaded. Legal estoppels exclude evidence of the truth and equity of the particular case, to support a strict rule of law, on grounds of public policy.

Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case, by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.

The facts upon which equitable estoppels depend are usually proved by oral evidence, and the evidence should doubtless be carefully scrutinized, and be full and satis-

factory, before it should be admitted to estop the party from showing the truth, especially in cases affecting the title to land.

But where the facts are clearly proved, the maxim that estoppels are odious, which was used in reference to legal estoppels, because they shut out the truth and justice of the case, ought not to be applied to these equitable estoppels, as it has sometimes been, inadvertently as I think, from a supposed analogy with the legal estoppel, *by matter in pais*, to which they have in this respect no resemblance whatever. (Lord Campbell, in Howard v. Hudson, 2 E. & B., 10; Andrews v. Lyons, 11 Allen, 349, 351.)

In other cases, where more attention has been paid to the real nature of this equitable doctrine, it has been held that such estoppels are not odious, and to be construed strictly, but are entitled to a fair and liberal application, like other equitable doctrines which are admitted to suppress fraud and promote honesty and fair dealing. (Miller & Crompton, Justices, in Ashpital v. Bryan, 3 B. & S., 472; Cowen, J., in Dezell v. Odell, 3 Hill, 220; Commonwealth v. Moltz, 10 Barr, 530, 531; Buckingham v. Hanna, 2 Ohio St., 557; Van Rensselaer v. Kearney, 11 How., 326; Preston v. Mann, 25 Conn., 118, 128.)

The doctrine of equitable estoppels, while it is more frequently asserted than in former practice, is becoming to be better understood and more easily defined by the profession.

A party is estopped by his acts whenever he has gained an undue advantage, or has caused his adversary a loss or injury.

We must examine how far this rule should be applied to the case at bar. But we will first notice the second, third and fourth reasons upon which the appellants' evidence was ruled out. The second and third have no application to the principle involved. The evidence might

fall far short of proving a contract, and yet prove very conclusively a state of facts upon which the appellee would be estopped from setting up any claim to the land through his vendor's lien. It does not appear to have been the object of the appellants' counsel to prove a contract between Byler and the Swans, whereby the latter were authorized to sell the land for Confederate money. It may have been quite sufficient for them to prove that by his acts and declarations he had induced the Swans to make the sale under circumstances which would forever estop him from denying its validity.

As to the fourth reason given, that the judgment of the District Court of Gonzales county could not be impeached collaterally by the appellants, it is a sufficient answer that they were not parties to this judgment, and may have known nothing whatever of the proceedings under which it was obtained, although one of them appeared on the day of sale, and gave notice of an adverse claim.

Having thus stated the facts, and to some extent intimated their bearing upon the decision of this case, let us look to the principles of law which they invoke. We have not held that Confederate money can form a good and valid consideration for a contract; nor that one who purchases for Confederate money, without notice, can protect himself as a *bona fide* purchaser, without notice, for a valuable consideration.

But we have held that we will not disturb executed contracts, nor compel specific performance of executory contracts made for Confederate money.

Without, then, trenching upon any of the principles heretofore decided by this court, how does the case at bar stand?

Taking the excluded evidence as true, Byler has been the prime cause of an illegal contract being made between the appellants and their vendors. Can he have this con-

tract set aside? We think not. The court would not disturb the contract as between the appellants and the Swans, it being fully executed. Shall we then disturb it at the instance of Byler, who was really the cause of its being made? We would rather treat the sale from Swan to the appellants as binding upon all parties in any way connected with it.

We do not hold Byler bound by it, as one would ordinarily be held bound by a contract for the sale of land, for there is no such contract proven or offered to be proven as would bind him upon the principle governing contracts for the sale of land; but we treat him as one estopped by his acts from taking advantage either of the appellants or the Swans, in a matter which he has led them into, if the facts exist as offered to be proved by the appellants. This evidence should be heard, and if it be true the appellee is in equity forever barred from setting up his title to this land.

For these reasons the judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

BANK OF VIRGINIA ET ALS. v. SARAH P. HEDGES ET ALS.

In a suit to quiet title, where the plaintiff relies for title on ten years possession, it must appear that such possession was continuous; and should the plaintiff undertake to tack to his possession that of his tenant, it must clearly appear that he continued to exercise acts of ownership over the premises during the time which elapsed between the possession of plaintiff and that of his tenant.

ERROR from Collin. Tried below before the Hon. W. H. Andrews.

This was a suit by the defendants in error against the

plaintiffs in error to quiet title to 640 acres of land. Verdict and judgment for plaintiffs, and defendants prosecute writ of error.

The facts are stated in the opinion.

Throckmorton & Brown, for plaintiffs in error.

Burford & Jordan, for defendants in error.

WALKER, J.—We should affirm the judgment in this case, but for the uncertainty in which the statement of facts leaves a material question.

The land was patented to the heirs of Joseph Strickland on the twenty-eighth day of November, 1845, Williams, the administrator of Strickland's estate, having procured a survey to be made sometime in 1842.

In 1847 John M. Goss and wife, now Mrs. Hedges, settled upon 320 acres of the land embraced in the Strickland patent, and held the same under a Mercer's Colony certificate until about the year 1854, improving and occupying the same. About this time Goss appears to have become aware of the fact that the land on which he had settled was covered by the Strickland patent, and he appears to have informed the witness, Naylor, of this fact, and that he purposed floating his certificate and locating elsewhere; and so intending, he did leave the premises with his family. Shortly afterwards a brother of Goss entered into possession as tenant of John M., and a tenantcy under Goss is made out by the evidence, which continues up to the commencement of this suit.

But the question which interests us most in this case is whether or not this possession was broken in 1854 by John M. Goss leaving the premises. The facts do not satisfy our minds, nor do we think a jury should have been satisfied with them. If John M. Goss did continue to exercise acts of ownership and possession over the land during

the interval which elapsed between his moving away from and his brother going upon the premises, then there is no interruption of the statute, and the ten years statute of limitations settles the right of the appellees to 640 acres of the land. But if the adverse possession was broken at the time John M. Goss left the premises, his prior possession of six or seven years cannot be tacked to the subsequent possession of his tenants so as to make out a title under the ten years statute.

We feel it incumbent upon this court to reverse and remand this case, which is accordingly done.

REVERSED AND REMANDED.

38 616
83 251

MARY T. HARDIN v. M. A. HARDIN.

1. In a trial where a deed is attacked for duress pleaded by the grantor, it is error to admit the declarations of the grantor in support of his plea.
2. In such trial it was error to exclude testimony showing a consideration for such deed. Such evidence should be allowed in connection with the testimony showing duress, to explain the motive for the execution of such deed.
3. In a suit for divorce all questions of property between the parties should be settled; if not then settled they are considered as waived, and such waiver is final.

APPEAL from Hood Tried below before the Hon. Charles Soward.

Suit instituted by the appellant, Mary T. Hardin, against the appellee, Milton A. Hardin, for partition of a tract of land situated in Hood county, granted to Milton A. Hardin on the fifth day of February, 1855.

The patent was granted by virtue of augmentation certificate No. 100, issued to M. A. Hardin for two-thirds of a league and labor, by the board of land commissioners

of Liberty county, upon proof that he had married since his headright for one-third of one league had been issued.

The other defendant, Lazenby, was sued for trespass. Before the trial the defendant, Hardin, moved to Hood county, and Lazenby purchased a share of the plaintiff's interest.

The plaintiff alleged substantially that she and defendant, Milton A. Hardin, were formerly husband and wife; that whilst that relation subsisted he had conveyed to her by deed, dated on the twenty-fourth day of June, 1864, an undivided interest of one-half in the land described in the patent, being one-half the amount that remained after a locative interest of one-third had been taken out; that afterwards, on the eleventh day of January, 1866, she and defendant were divorced by a decree of the District Court of Galveston county; that defendant refused to divide said land with her, and praying for a writ of partition.

Defendant, Hardin, answered by a general denial at the March term of the court, 1871, and at the next term filed an amended answer, alleging that the deed of 1864 was procured by duress, and was void.

Plaintiff met these allegations by an amended petition, denying the duress, and alleging that even if the deed were void it only conveyed her legal interest in the property, for the reason that it was the community property of herself and defendant at the time the deed was made, and at the time the divorce was granted; that she was the wife of defendant at the time the certificate was granted, and that she did not set up her community right in the divorce suit, because she depended upon the deed from defendant to her, which up to that time had not been questioned; and she referred to a copy of the record of the divorce suit on file in the cause to show the date of

her marriage with defendant, and to show that no question was made as to community property in that suit.

Upon the trial defendant excepted to so much of plaintiff's amended petition as set up a community interest in the land sued for, on the ground that all community rights were adjudicated, or should have been, at Galveston, in the divorce suit. This exception was sustained by the court, and the plaintiff excepted.

Upon the trial the plaintiff offered in evidence the patent to Milton A. Hardin, the deed from Hardin to plaintiff, and the certified copy of the record in the divorce suit; all of which were read without objection. Plaintiff then offered a certified copy of the original certificate upon which the patent was issued. This was objected to by defendant on the ground that it only showed a community interest and should be excluded. This objection the court sustained, and the plaintiff excepted.

The defendant proved by several witnesses the declarations of M. A. Hardin that he had been compelled by the plaintiff to sign the deed for one-half the land to her, and then offered a large amount of testimony to show duress, mental and bodily infirmity, etc., and closed.

The instruction of the court to the jury confined the issue solely to the question of duress in obtaining the deed of June 24, 1864, and the verdict of the jury is confined to that issue. Verdict and judgment for defendant, and plaintiff appealed, and assigned errors: 4. The admission of the declarations of M. A. Hardin.

5. The exclusion of the copy of the certificate under which the patent was issued.

S. H. Renick, for appellant.

A. J. Hood, for appellee, cited the following authorities: 1 Story's Equity, Sec. 239; Parsons on Con., 392; Met-

calf on Con., 26; McGowen v. Bush, 17 Texas, 199; Foster v. Wells, 4 Texas, 104; 1 Johns. Cas., 436; 1 Blackf., 360; Catlin v. Glover, 4 Texas, 151; Mays v. Lewis, 4 Texas, 38; Davis v. Loftin, 6 Texas, 496; Campbell v. Wilson, 6 Texas, 379; Kerr on Fraud, 352; Kerr on Fraud, 128; Folk v. Birdelmar, 6 Watts, 339; Crest v. Jack, 3 Watts, 238; Devereux v. Burgwyn, 5 Ired. Eq., 351; Nevin v. Belknap, 2 Johns., 373; Copeland v. Copeland, 28 Me., 525; Morton v. Hogdon, 32 Me., 127; Morris v. Moore, 11 Humph., 433; Taylor v. Zipp, 14 Mo., 482; Eldred v. Hazlett, 33 Penn., 307; Herndon v. Casiano, 7 Texas, 322; Harrison v. Knight, 7 Texas, 47; Campbell v. Wilson, 6 Texas, 379; Hensley v. Lytle, 5 Texas, 497; Morris v. Runnels, 12 Texas, 175; Barrow v. Philleo, 14 Texas, 345.

MCADOO, J.—We will not pretend to discuss and determine all of the alleged errors committed by the court below, in the bills of exceptions and the assignment of errors. A single error, that set out in the fourth assignment, permitting the *ex parte* statements of the defendant, M. A. Hardin, as testified to by the witnesses, to go to the jury, must reverse the case. These statements were mere hearsay evidence, and should have been excluded.

We think, also, that the fifth assignment of error is well taken. The copy of the original certificate on which the patent issued to the land in controversy, and all other evidence going to show that the land was acquired during the marriage, should have been permitted to go to the jury, not to show that the plaintiff now has a community interest in it, but to show that there was a good and sufficient consideration for the conveyance from Milton A. Hardin to the plaintiff. This should have gone to the jury, in connection with the evidence which tended to

show that the deed of conveyance was executed under duress, so that the jury might determine what was the moving cause.

Possibly, if all the evidence legitimate had gone to the jury, and that which was not legitimate had been excluded, the jury might have reached a different conclusion.

It is true, that if duress has been made out, it is not material to inquire whether there was a sufficient consideration to support the conveyance or not; because, if there was duress, it would annul and avoid an act, whether by deed or by simple contract. (McGowan v. Bush, 17 Texas, 195.)

But the jury should have had all the pertinent facts before them, which might tend to show that *not duress*, but other motives may have induced Hardin to make the deed.

As this cause must be remanded for a new trial, we deem it proper to state our view of the *status* of the property in controversy.

M. A. Hardin, the appellee, obtained an augmentation grant of land by reason of his marriage with the appellant, Mary T. Hardin. This land was therefore community property.

In 1864 the appellee executed to the appellant a deed of conveyance to one-half of this land, and thereupon they severed their conjugal associations.

In 1867 appellant sued for and obtained a divorce from the appellee. The appellee, though brought into court by personal service in that suit, entered no plea whatever, and the trial was *ex parte*.

In this suit for divorce should have been tried and settled all property rights between the parties. Article 3452, Paschal's Digest, reads as follows:

"In all suits and proceedings for divorce from the bonds of matrimony, the defendant shall not be compelled

to answer upon oath, nor the petition be taken 'for confessed' for want of an answer; but the decree of the court shall be rendered upon full and satisfactory evidence, independent of the confession or admission of either party, and upon the verdict of a jury affirming the material facts alleged in the petition; and the court pronouncing a decree of divorce from the bonds of matrimony shall also decree and order a division of the estate of the parties in such way as to them shall seem just and right, having due regard to the rights of each party and their children, if any; *provided, however*, that nothing herein contained shall be construed to compel either party to divest him or herself of the title to real estate or to slaves."

If not so settled, all controversy on that subject was waived by both parties, and that waiver was final as to both. (Foster v. Wells, 4 Texas, 101; 1 Blackford, 360; 1 Johns. Cases, 436.)

Each party was left by the decree of divorce with such property as he or she had at the time. If there was a cause of controversy between them as to any property, such controversy should then have been made; if not made, it was waived and lost.

A deed had been made three years before by the husband to the wife. It is claimed by the husband that the deed was obtained by duress. If it was, it was voidable, not void. In the divorce suit the issue of duress should have been made, and the conveyance would then have been avoided, if the proof had shown such duress.

The issue was not made at the only time and at the only suit in which it could be made as between these parties; the husband thereby waived his remedy, and it is lost forever. The matter is *res adjudicata*.

The cause is reversed and remanded.

REVERSED AND REMANDED.

S. R. BASSHAM v. THE STATE OF TEXAS.

1. On a trial for murder the declarations of the defendant, made at the time of the killing, to the deceased, charging him with having insulted the wife of defendant, are not admissible in evidence for the defendant on cross-examination as part of the *res gestæ*, in the absence of testimony *aliunde* that such insult had been given.
2. A paper purporting to be an indictment, but not signed by the foreman of the grand jury impanneled at the term of its filing, may be signed by him at a subsequent term.
3. When a party, on cross-examination of a witness, seeks to draw out new matter not inquired about in the examination-in-chief, he makes the witness his own for that purpose, and the opposite party may cross-examine on such new matter.
4. A defendant cannot, when the jury is being polled, question a juror in regard to the misconduct of the jury during trial.

APPEAL from Ellis. Tried below before the Hon. Hardin Hart.

The appellant was indicted for the murder of Jasper Brock.

The evidence shows that the appellant, about half an hour before the homicide, attempted to borrow a pistol from two different parties. Immediately on meeting Brock appellant said, "Brock, you have insulted my wife, and I will kill any d——d son-of-a-b——h who insults my wife," and thereupon shot him, killing him instantly.

From the question submitted to the court by the jury after their retirement, it would seem that Brock made some reply, but the statement of facts does not indicate what he said.

G. P. Bullard, the only witness to the killing, was permitted, over the objection of appellant, to assist the district attorney in selecting a jury.

It was in evidence that about an hour before the killing the deceased was at appellant's house.

Statement of the case.

A pistol was found in the pocket of Brock after his death.

The indictment was filed in court December 19, 1870, and was neither signed by the foreman of the grand jury nor endorsed "a true bill."

On the trial in January, 1873, the court permitted D. G. Ransom, the foreman of the grand jury for the December term, 1870, to sign the indictment.

On the trial the defendant, in cross-examination, asked the witness, Bullard, "if, at the time the shooting occurred, he heard anything said by either defendant or deceased; and if so, what it was?" which being objected to by the district attorney, the objection was sustained.

The district attorney, on the trial, asked a witness what was the reputation of the defendant's wife in the community, objection to which was overruled. (The answer was that her reputation was good.)

The defendant also asked a witness "whether or not, on the evening of the day Jasper Brock was killed, he was in company with said Brock, and heard said Brock say anything concerning illicit intercourse with defendant's wife; if so, what that declaration was?" objection to which was sustained.

Defendant also, on the trial, asked the witness, Tucker, introduced by defendant, if he did not, on the day Brock was killed, and but a short time before, hear Brock declare that he would have illicit intercourse with defendant's wife; that on being advised to desist deceased swore that he did not care a d—m for the consequences, and reiterated his declaration in the most vulgar terms; took a block of wood, wrote something on it, and went out at the door, where Mrs. Bassham was, and threw it to her?" objection to which was sustained.

The court charged the jury in regard to murder in the first and second degrees, in the language of the statute.

The jury, after retiring, desiring further instructions, the following was given:

"Before the jury can take the assertions of the defendant at the time of the homicide as of any weight, it must appear from the evidence that the defendant had been informed that the deceased had insulted his wife; and further, that there had been no previous meeting since he had received such information. Unless it so appear from the evidence, you will consider neither the words of the defendant nor of the deceased."

Verdict and judgment finding defendant guilty of murder in the first degree, and assessing his punishment at imprisonment in the State penitentiary for life, from which he appealed.

No brief for the appellant.

Brown, for the State.

WALKER, J.—There being no brief for appellant in this case, nor any assignment of errors found in the record, we are forced to look for a ground on which a reversal is sought to the motion for a new trial and the bill of exceptions.

A new trial was sought on the ground that the court erred in the charge to the jury, in that it directed the jury not to consider the defendant's declarations at the time of the homicide as of any weight.

The instruction appears to have been given in reply to an inquiry coming to the court from the jury, and, looking to the statement of facts, we cannot see that instruction is erroneous. There was nothing proved which entitled the defendant to offer his declarations in evidence as part of the *res gestæ*.

The defendant charged the deceased with insulting his wife, and thereupon shot him. If there had been any

truth in this charge, it might have been proved upon the trial. The wife was not put upon the stand as a witness, nor any evidence offered which was competent to show that the appellant had received any information of an insult having been offered to his wife by the man he murdered.

The language of the charge, though not, perhaps, most aptly chosen, sufficiently explains the law to the jury, and could not have misled them. There was no evidence to show that the killing took place immediately upon the insult being offered to the wife of the appellant, or at the first meeting of the parties after the insult, if, indeed, any insult had been offered. A new trial should not have been granted upon the ground that the verdict is contrary to law and evidence. The verdict is amply supported by the evidence, and is in accordance with law. The defendant sought to borrow a pistol of one person who declined to furnish him the weapon. He borrowed one from another person, and, as near as we can tell from the proof, about one-half hour after he obtained the pistol he shot the deceased three times, inflicting a mortal wound at each discharge of the pistol.

We find nothing in the bill of exceptions requiring a reversal of this judgment.

When a party, on cross-examination of a witness, seeks to draw out new matter not inquired of on the examination-in-chief, he makes the witness his own for this purpose, and the opposite party may insist upon a cross-examination. Here the party on cross-examination sought to offer his own declarations, no part of which had been offered by the State, and which did not form a part of the *res gestæ*. Such evidence was incompetent. The court properly sustained the objection of the district attorney to the cross-questions put to a State witness. If the evidence were incompetent—but we confess we cannot

understand from the record that such a ruling was made—for the record shows that a witness, Bullard, was permitted to state what was said both by Brock, the deceased, and by the appellant, at the time of the homicide—if the ruling complained of by the bill of exceptions was made during the trial, the court must have receded from it in admitting Bullard's evidence, and the appellant could not have suffered by such a ruling. We find no error in the ruling of the court referred to in the 6th, 7th, 8th and 9th exceptions.

The evidence was not admissible. There was no error in the court refusing to give the special instructions asked. We find no evidence in the case which could properly have reduced the crime from murder to manslaughter.

The 12th exception is not well taken, and this is the only one requiring further notice. The defendant had a right to have the jury polled, but he had no right, after this had been done, to inquire of them if they had separated or been intoxicated during the trial.

The judgment of the District Court is affirmed.

AFFIRMED.

JOHN F. BROWN ET AL. V. A. J. HUNTER.

1. A petition sufficiently sets out the name of the plaintiff when it follows the note on which the suit is brought.
2. A sheriff's return is sufficient showing that he had delivered to C. D., in person, one of the defendants, a copy of the citation and the accompanying certified copy of plaintiff's petition.

ERROR from Hays. Tried below before the Hon. J. P. Richardson.

Suit on a promissory note payable to A. J. Hunter, and signed by the plaintiffs in error.

The petition described the plaintiff as he was named in

the note sued on, and in other respects was in usual form of petition on promissory note by the payee and against the makers.

The sheriff's return was as follows:

"Came to hand 26th March, 1872, and executed 30th April, 1872, by delivering to Joe F. Brown, in person, one of the defendants, a true and correct copy of this writ, together with the accompanying certified copy of plaintiff's petition.

"J. R. BROWN, Sh'ff Hays Co., Texas."

Judgment final by default was rendered for amount due on the note.

The defendants sued out a writ of error. The assigned errors are noticed in the opinion.

No counsel for plaintiffs in error.

Montgomery & Wheeler, for defendant in error.

OGDEN, P. J.—The petition in this case is certainly inartistically drawn, without much regard to form or precedent, but we are inclined to hold it sufficient. The plaintiffs in error executed their note, payable to A. J. Hunter, and we think they should be bound according to their promise; besides we are not informed that "A. J." is not the full Christian name of plaintiff; and if so, then the petition is in full compliance with the statute in that respect.

The objection raised to the return by the sheriff upon the citation is untenable, as clearly decided in Cummings v. Rice *et al.*, 9 Texas, 528; and in Edmonson v. Yates, 25 Texas, 373; and in Graves v. Robertson, 22 Texas, 131; and Thomas v. Bishop, 24 Texas, 302. There is no sufficient error in the judgment of the lower court to authorize a reversal, and it is affirmed, without damages.

AFFIRMED.

M. GRAHAM v. J. E. HAWKINS ET AL.

1. To authorize the sale of land under the Probate Act of 1840, the administrator was required to obtain an order for sale, clear and specific in terms; and such order should be strictly pursued to pass title to the purchaser.
2. An order of the probate court under the act of 1840 for the sale of "so much land lying in Robertson county, and west of the Trinity river, as would pay the debts of the estate, amounting to about $1500;" *held*, void for uncertainty.
3. See this case for irregularities in a probate sale noticed in a collateral proceeding.
4. That one of the links in the chain of title of the defendant in possession is a quit-claim deed, when his deed and that of his vendor are warranty deeds, does not prevent his recovery upon his plea of *bona fide* purchaser, upon proof of the other requisites of such defense.
5. Where there was evidence introduced showing defects in proceedings which were requisite to the authority of the administrator to sell lands, the court, after instructing the jury that the law presumed everything legally necessary to have been done by the probate court, should have given the further charge that such presumption was overcome by facts which prove the contrary.
6. Against a defendant in possession holding under a warranty deed from a vendor who also claimed under a deed with warranty, it is error to charge the jury that the recitals in a quit-claim deed (of a remote vendor) were evidence of a prior unregistered conveyance (not recited in the same), as if such prior conveyance had been duly recorded.
7. The case of Burchard v. Rogers, 34 Texas, 441, limited.

ERROR from Ellis. Tried below before the Hon. Hardin Hart.

The appellees brought trespass to try title against appellant for three-quarters of a league of land, the headright of Littleton White, in Ellis county.

The appellant, Graham, pleaded not guilty, and that he was an innocent purchaser of 640 acres of the land.

Both parties claimed under the same title. The land was patented to Philip A. Sublett, assignee of L. White, April, 1847. March 1, 1842, Ph. A. Sublett conveyed to

Statement of the case.

V. M. Sublett the Littleton White certificate by warranty deed, and recorded June, 1853.

Glover, administrator of V. M. Sublett, conveyed the land to appellees October, 1844. This deed was recorded in 1852. In this connection was read a transcript of the proceedings in the estate of V. M. Sublett, noticed in the opinion.

Appellant deraigned title as follows: Quit-claim deed from Phil. A. Sublett to G. A. Sublett, dated August, 1849; deed from G. A. Sublett to Malcomb Smith, June, 1852, and from Smith to appellant, September, 1852. The last two being deeds with warranty. The appellant proved payment of purchase money.

The quit-claim deed from Ph. A. Sublett was as follows:

"Whereas, I, Philip A. Sublett, sometime in the year A. D. 1842, sold to Valentine M. Sublett two certificates, for one league and labor of land each, to-wit, the headright certificate of Littleton White and Live Dixon, and gave to the said Sublett my bond for an amount not recollected, conditioned that patents would issue upon said certificates; and whereas, the said Valentine M. Sublett died before the patents issued to said certificates; and whereas, said bond is now lost; and whereas, also, Geo. A. Sublett, brother of said Valentine M. Sublett, having caused said land to be surveyed and patented since the death of said Valentine; and the said Geo. A. Sublett appearing to be entitled to the benefits of said bond from me to the said Valentine, I do convey unto the said Geo. A. Sublett, his heirs and assigns, all my right, title, claim and interest in and to the league and labor of land, patented to me, as assignee of Littleton White, by the State of Texas, on the first day of April, A. D. 1847; and for a more perfect description of said land reference is hereby made to the accompanying patent of that date; to have and to hold the same granted premises, the said Geo. A.

Sublett, his heirs and assigns forever, in fee simple. Given under my hand and seal, this fifteenth day of August, A. D. 1849."

The court charged the jury, "that the recitals in the deed made by Philip A. Sublett to George A. Sublett carry legal notice of the prior conveyance by P. A. Sublett to V. M. Sublett; and that George A. Sublett and all other parties holding under that deed are affected by that notice as fully as if the prior conveyance from P. A. to V. M. Sublett had been placed upon record in the proper county immediately after its execution.

"2. That the law presumes that everything legally necessary was done by the Probate Court of Bowie county, with regard to the sale of the land by Glover, the administrator; and that the administrator took all the steps legally incumbent upon him."

Verdict and judgment for plaintiff, and defendants appealed.

J. W. Ferris, for appellant.

A. A. Kemble, attorney for appellees, cited 18 Texas, 198, McNally v. Chapman; 17 Texas, 148, Weathered v. Boon; 23 Texas, 676, Weathered v. Boon; 22 Texas, 574, Grumbles v. Sneed; 15 Texas, 415, Gilbeau v. Mays; 28 Texas, 53, Powell v. Haley *et al.*; 28 Texas, 793, McCulloch v. Renn; 32 Texas, 495, Menifee v. Hamilton; 30 Texas, 565, Portis v. Hill; 26 Texas, 235, Jones v. Muisbach; 26 Texas, 253, Martin v. Parker; 23 Texas, 469, McAlpine v. Burnett; 11 Texas, 140, Mayfield v. Rennick; 1 Story's Eq., § 400; Paschal's Digest, note 1092.

Amzi Bradshaw, attorney also for appellees, cited 3 Wheat., 449, Brown v. Jackson; 7 Peters, 252, Vattar v. Hinde; 10 How., 174, Hallett v. Collins; 34 Texas, 441,

Rogers v. Burchard; 25 Texas, Sup., 323, Van Hook v. Simmons; 2 How., 319, Grignon v. Astor; 2 Peters, 157, Thompson v. Tolmie; 11 S. & R., 422, McPherson v. Cunliff; 27 Texas, 497, Withers v. Patterson; 27 Texas, 79, Flannigan v. Pierce; 18 Texas, 179, Alexander v. Maverick; 6 Texas, 146, Tolliver v. Hubble; 12 Texas, 449, Poor v. Boyce; 6 Porter, 219, Wyman v. Campbell; 4 Texas, 443, Lynch v. Baxter; 13 Texas, 315, Howard v. Bennett; 15 Texas, 506, Burdett v. Silsbee; 19 Texas, 369, George v. Watson; 26 Texas, 289, Null v. Cody; 28 Texas, 734, Giddings v. Steele; Paschal's Digest, Articles 1327, 1328, 1333; 32 Texas, 146, Peevy v. Hurt,

WALKER, J.—The plaintiff in error, Graham, was the defendant, with others, in the court below. The action is trespass to try title.

A summary of the title may be thus stated: In April, 1847, the land was patented to Philip A. Sublett, the assignee of Littleton White.

The defendants in error claim under a transfer of the headright certificate of White, by Philip A. Sublett, to V. M. Sublett, dated in March, 1842, and recorded in June, 1853, and by a decree of the probate court, and a deed from Martin Glover, as the administrator of V. M. Sublett's estate, dated October, 1844, and recorded ten years afterwards.

Graham, the plaintiff in error, claims 640 acres of the land by deed from Philip A. Sublett to George A. Sublett, dated August, 1849, and recorded in June, 1852; and by deed from George A. Sublett to Malcomb Smith, dated July, 1852, and recorded September, 1852, and by deed from Smith to himself, dated August, 1852, and recorded September, 1852.

The plaintiffs below, it will be seen, claim under a senior title; but it is contended that their title is invalid;

that no valid title passed under the decree of the probate court, and the sale by the administrator of V. M. Sublett. The sale does not appear ever to have been confirmed, and it is claimed that it was not made in accordance with the decree, and is therefore void.

The plaintiff in error also insists, that he is a purchaser in good faith for a valuable consideration, and is not chargeable with actual or constructive notice of the senior title. If this be true, a court of equity must protect him against an unrecorded senior title.

It is insisted for error, that the administrator's deed was improperly admitted in evidence, there being no confirmation of the sale. There can be no doubt that a sale of lands, under an order of a court of equity, requires the confirmation of the court, in order to make the deed binding.

It appears that this sale was made under the act of 1840, by which law administrators were required to make a return, under oath, of their accounts of sales within one month from the date of the sale.

The act of 1840 does not, in terms, require a confirmation of the sale, but unless such were the intention of the law, there was certainly no necessity for the return; but there was a manifest necessity for such a return for the protection of all parties interested in the estates of deceased persons, and it was necessary that the order of sale should be certain and specific, and strictly pursued. (Peters v. Caton, 6 Texas, 559.) In this case the court hold, that the power given to executors and administrators, to sell land under an order of court, is a personal trust which must be strictly pursued; and if transcended in any essential particular, their acts will be void. The same doctrine is laid down in Brown v. Christie, 27 Texas, 77; and the case of Peters v. Caton is approved.

In Brown v. Christie the court decide, that where a sale

by a guardian has been illegally made, but has been confirmed by the probate court, it cannot be collaterally questioned in a suit for the land brought by a party who, in good faith, derives his title under the purchaser at such sale.

But it is strongly intimated that a sale made, as in the case of Peters v. Caton, under the probate law of 1840, did not require to be confirmed by the probate court. If this be true, it is certainly different from the general rule, both of law and practice, in courts of equity. Yet the learned judge, deciding the case of Brown v. Christie, says: "It may be well said, where there is no confirmation of the sale by the probate court, that the sale by the administrator, like that of the sheriff, is a nullity if not made at the time and place prescribed by law."

There is no doubt that there were great irregularities in the proceedings of the probate court, as well as those of the administrator of the estate of V. M. Sublett.

There does not appear to have been any inventory, or appraisement, of any land belonging to the estate of V. M. Sublett, returned to the Probate Court of Red River county; the inventory was of land certificates and papers, yet the court ordered so much land lying in Robertson county, and west of the Trinity river, to be sold, as would pay the debts, amounting to some $1500.

There was no inventory nor return of sales, nor was there any confirmation of a sale; but it does appear from the receipts of the county surveyor of Robertson county that there were files of land certificates in that county belonging to Sublett's estate, amounting to nearly thirty-four thousand acres, including the Littleton White certificate. The order of the court was so indefinite as to leave it to the discretion of the administrator to have sold any or all of this large amount of land, with just the same propriety as that which he did sell; and it would seem

very difficult to determine that the action of the court has ever been exerted in any legal manner over the land actually sold. We incline to think that an order so latitudinous in its character and liable to abuse should be held void for uncertainty.

It does not appear that the lands sold were properly advertised. The testimony of the administrator to this point, after a lapse of thirty years, must be very unreliable.

Under the law as it existed at the time, the administrator should have sold on a credit of one year; yet his deed shows that he sold for cash.

The charge of the court that the law presumed everything legally necessary to have been done by the probate court, was defective, and the court should have explained at least that such presumptions are overcome by facts which prove the contrary.

We think the court erred in charging the jury that Graham, the plaintiff in error, was affected by notice of the recitals in the deed from Philip A. Sublett to George A. Sublett.

The truth is, Graham holds the legal title—the patent issued to Philip Sublett, as the assignee of White, in 1847; he conveyed to George A. Sublett; he to Smith, and Smith to Graham.

The title of the defendants in error comes by a transfer of the White certificate from P. A. to V. M. Sublett, in 1842, four or five years before the patent issued.

The most that the defendants in error can claim is an equity under the transfer of the White certificate, upon which the plaintiffs in error might be compelled to convey the legal title.

And now as to this transfer of the White certificate from P. A. to V. M. Sublett. It does not appear to have been filed in the General Land Office; it was not recorded

in the county where the land lies until 1853, one year after Graham had bought six hundred and forty acres of the land.

As to the recitals in Graham's deed, they only refer to a conditional sale, and it does not appear that the conditions had been performed. The recitals are very vague and uncertain, and we do not think them sufficient to put Graham on inquiry. (See Wethered v. Boon, 17 Texas, 150.)

The defendants in error refer to the case of Rogers v. Burchard, 34 Texas, 442. The point relied on is, that a quit-claim deed conveys only the interest of the grantor at the time he makes it; and that a party claiming under it cannot be deemed a *bona fide* purchaser, of any greater interest than his grantor had at the making of the deed; and that a quit-claim deed cannot exclude the operation of a prior unrecorded deed. But we do not perceive the application of the principle to the facts in this case. Philip Sublett was the assignee of White; the patent issued to him in 1847; he conveyed by a quit-claim deed to G. A. Sublett in 1849, who conveyed to Smith by warranty deed in 1852; and he conveyed to Graham. This makes a regular chain of title from the State down to Graham.

The defendants in error claim an equity, going behind the patent, by virtue of the transfer of the certificate to V. M. Sublett, in 1842. This transfer did not accompany the certificate; was not filed in the Land Office, nor recorded, until Graham had purchased the legal title; and we therefore think it clear that he is not affected by any notice of this prior equity set up by defendants in error. This question is settled on principle, in Love v. Berry, 22 Texas, 378. A purchaser at an administrator's sale of the legal title will be protected against an older equitable title. The court say, the principle is well settled, that

where one purchases from a party having the legal estate, without notice of the existence of any trust, such purchaser takes the estate freed from the trust.

We are clearly of the opinion that the appellant, in his title, is not affected by an equity going behind the patent, of which he had no actual or constructive notice, and he will be protected as an innocent purchaser, without notice.

The judgment of the District Court is reversed and the cause remanded.

REVERSED AND REMANDED.

JAMES COOLEY V. THE STATE OF TEXAS.

1. Prescribing rules for impanneling juries in State cases.
2. No challenge should be made until the panel is full; nor is it proper to make more than one peremptory challenge at the same time.
3. Less than twelve men will not constitute a jury in State cases, and challenges should never be made except from a full jury.
4. The proper mode of selecting a jury is to proceed by trial or examination until twelve qualified jurors are found; then the party holding the affirmative of the issue should be required to pass upon the jury; should he pass upon it without challenge, the party holding the negative of the issue is then called upon to pass upon it. Should either party make a peremptory challenge, another juror must be called, who, if qualified, takes his seat in the box, when the peremptory challenging may proceed.

APPEAL from Wise. Tried below before the Hon. C. C. Binkley.

This was a felony, and the opinion is confined to a discussion of the practice that should obtain in impanneling jurors, and especially in making challenges.

The facts, so far as necessary, appear in the opinion.

No brief for appellant furnished Reporters.

Attorney-General, for the State.

Opinion of the Court.

WALKER, J.—This is a case in which arises on the bill of exceptions a question of great importance to the practice in the District Courts.

Different judges appear to have adopted different practices in their districts touching the mode of impanneling juries, and we feel called on to state the rule which should be uniformly adopted.

A party is not limited in the number of challenges he may make for cause. The challenge may be made to the array *propter defectum;* from personal objections, such as alienage, infancy, or lack of statutory requirements; *propter affectum*, on account of bias or partiality; *propter delictum*, or because of crime, by which legal incompetency has been incurred. A challenge to the array is not permitted to all the States of this Union, but it is a practice known and recognized in this State. (See Van Hook v. The State, 12 Texas, 252.) Of course the right to challenge for cause is common to both parties, and the court must judge of the sufficiency of the cause assigned. At common law it was usual to appoint triors for this purpose, but such is not the practice in most of the States. A peremptory challenge is one made for which no reason need be given, and must be allowed by the court.

The number of these in trials for felonies at common law was fixed at thirty-five. (4 Black. Com., 354.) Challenges *to the poll* are such as are made to individual jurors, as distinguished from the array.

The time to make a challenge is between the appearance and the swearing of the jurors. (8 Gratt. Va., 637; 3 Iowa, 216; 23 Penn. State, 12; 8 Gill. Md., 487; 8 Blackford, 194; 3 Geo., 453; 1 Curt. C. C., 23.) It is a general rule at common law that no challenge can be made until the panel is full, and this rule should never be departed from; nor is it competent to challenge perempto-

rily more than one juror at the same time. (4 Barnwell & Ald., 476.)

And should a party wish to make a challenge to the array when the panel is not full, he may pray a *tales* to complete the number, and then make his objection.

All challenges to the array must precede those made to the poll, and should a party make challenge to the poll, he will be held to have waived his right of challenge to the array. (Coke's Litt., 158; Bacon's Abr., title Juries, Chap. 11; 6 Cal., 214.) A juror who has been unsuccessfully challenged for cause may be peremptorily challenged. It is therefore obvious that all challenges for cause should be exhausted before any peremptory challenge is made. (4 Blackstone Com., 356; 6 Tenn., 581; 4 Barn. & Ald., 476; 5 Cush. Mass., 295.) A challenge to the array should be made in writing and submitted to the court, but those made to the poll are made verbally, usually by counsel, and the challenge should always be couched in polite and respectful language. It is competent under the practice of some of the States to plead an abatement, the want of qualification on the part of individual jurors, or even a plea in abatement may be urged against the array, but we believe such has not been the practice in this State.

The bill of exceptions taken in this case shows that the court compelled the defendant's counsel to make his peremptory challenges when the panel was not full, and consequently there was no jury. Less than twelve men will not constitute a jury in a case such as the one at bar.

It may not be improper to illustrate how unjustly such a rule of practice might be made to operate. Suppose the prisoner's counsel to have ten peremptory challenges; there are twelve men in the box, and he is compelled to go on and exhaust his challenges without having the

panel refilled. At the close there are but two of the original jurors in the box, but there are ten bystanders in the house with whom the sheriff fills the panel. Every one of these may be more obnoxious or unfriendly to the prisoner than any one of those his counsel has challenged. Now it does appear that a more complete method of packing a jury against the prisoner could scarcely be adopted. But the rule may be made to work just as strongly against the State, and would be grossly erroneous in either case.

It is not an unknown practice in some of the districts for an attorney to make two or three or four peremptory challenges to individual jurors at the same time. This is wrong and should never be allowed. It is a practice certainly that no lawyer of any shrewdness would ever adopt unless compelled by the court.

The proper mode of selecting a jury is to proceed by trial or examination of the jurors until twelve are found against whom there is no legal disqualification. Then the party holding the affirmative of the issue to be tried should be invited by the court to look upon the jury. Should he pass upon the jury without challenge, the party holding the negative of the issue is then called to pass upon the jury. Should he make no peremptory challenge, the jury is then sworn. But should either party make a peremptory challenge another juror must immediately be called, and if he prove a competent and qualified juror he takes his seat in the box; if not, another is called, and so on until the panel is again full; then the peremptory challenging may proceed.

The bill of exceptions in this case shows that the rules, as herein laid down, were violated, and it may have been to the prejudice of the appellant. There is no objection to the manner in which the court charged the jury. The charges refused, so far as the law required they should

have been given, were given in the body of the charge as given by the court.

The judgment of the District Court in this case must be reversed and the cause remanded.

REVERSED AND REMANDED.

THE STATE v. ALBERT FRANKS ET AL.

1. Section 54, of Chapter 78, approved the fifteenth of August, 1870, providing, that "if any person shall, by bribery, menace, willful falsehood, or other corrupt means, attempt to influence any elector in this State, in giving his vote or ballot, or to induce him to withhold the same * * * at any election in the State, he shall, on conviction thereof, be deemed guilty of a misdemeanor," etc., extends to the protection of the elector in an election for Congressmen, as well as for State or county officers.
2. It is immaterial whether an election was for Congressmen or for State officers, under the statutes; the election was being held under the laws of this State, and the offender is punishable.

APPEAL from Lavaca. Tried below before the Hon. Wm. H. Burkhart.

The defendants, Albert Franks and Leve McHenry, were indicted by the grand jury, and the charge is that they "did willfully and unlawfully attempt to hinder Isaac Williams (he being a legally qualified elector) in the free exercise of the right of suffrage at the election then pending in the town of Halletsville, for a representative in the Congress of the United States from the Fourth Congressional District of the State of Texas, by the use of willful falsehood, to-wit, by then and there telling the said Isaac Williams that if he voted for Hancock (one of the candidates for Congress at that election) he would be fined fifty dollars and sent to the penitentiary for two and a half years."

Syllabus.

The defendants excepted to the indictment, because the laws of the United States had exclusive cognizance over the offense.

The exceptions were sustained, and appeal prosecuted in behalf of the State.

Attorney-General, for the State.

No brief furnished for the appellees.

OGDEN, P. J.—The indictment in this case was framed under the 54th Section of the Act of the Legislature approved August 15, 1870, and charges that the defendants "did willfully and unlawfully attempt to hinder Isaac Williams, he being a legally qualified elector, in the free exercise of the right of suffrage," at the election then pending. We think this indictment charges an offense under the statute referred to. It is quite immaterial whether the election was for a State officer or for a Congressman of the United States; the election was being held under the laws of this State, and the offender is punishable under the laws of this State. The court therefore erred in sustaining the exceptions to the indictment.

The judgment is therefore reversed and the cause remanded.

REVERSED AND REMANDED.

W. H. CUNDIFF V. THE STATE OF TEXAS.

1. It is not necessary in a bail bond that the venue of the offense named be stated therein.
2. It will not vitiate a bail bond that it expressly requires the principal to appear from day to day, etc.
3. There is no time fixed by law for the filing of the bail bond; it is sufficient if it be in court and on file before trial.

ERROR from Houston. Tried below before the Hon. Samuel L. Earle.

Plaintiff in error was surety on the appearance bond of one Ross, charged with theft. Ross failing to appear, his bail bond was forfeited, and proceedings had so that judgment final was rendered against plaintiff in error for $800 — from which he prosecutes a writ of error to this court.

The proceedings are shown in the opinion of the court.

No brief for appellant has reached the Reporters.

Attorney-General, for the State.

WALKER, J.—This case is not briefed for the appellant, nor is there any proper assignment for errors. The petition for the writ of error probably states the reasons for bringing the cause to this court.

The affidavit for a continuance is that of the attorney, and not of the party who should make it; but it is not sworn to or signed, and therefore need not be further noticed.

The theft of a watch and chain, with which Ross is charged in the bond, *is* an offense against our laws. It is not necessary that the bond should state the county in which the offense was committed. (The State v. Brown, 34 Texas, 146.)

The condition and requirements of the bond are in accordance with law. A recognizance or bail bond is not defective because it requires the party bounden to appear from "day to day." But it is objected that the bond was not upon the files of the court. The bond appears to have been filed "*nunc pro tunc*," on the day of entering the second judgment *nisi*. There is no time fixed by law for the filing of the bond, and it is sufficient if it be in court,

and on the files, before the trial. (Haverty *et al.* v. The State, 32 Texas, 602.) In the absence of anything to the contrary, the presumptions are in favor of the judgment, and that everything necessary to be done was done in accordance with law.

There has been a good deal of frivolous resistance to this judgment, for which nobody assumes the responsibility in this court. But we find no error in the record on which to reverse the judgment, and it is therefore affirmed.

AFFIRMED.

LEM. RITCHER v. THE STATE OF TEXAS.

1. In prosecutions for theft the ownership of the stolen property must be satisfactorily proven as alleged.
2. See this case for testimony *held* insufficient to sustain the allegation of ownership.

APPEAL from Dallas. Tried below before the Hon. Hardin Hart.

In June, 1872, the defendant was convicted of theft of a gelding. The indictment charged the ownership of the gelding in Seth Stadden.

On that point the testimony is as follows:

"Seth Stadden, a witness for the State, testified, that on the thirteenth day of June, A. D. 1871, his gelding, the one alleged to have been stolen, was missing from the range in Dallas county; that he does not know who took him; went in pursuit, and found him in possession of Eli Magnor, in Wood county, and proved him away. Said gelding was about five or six years old; was taken in Dallas county without the consent of witness. On cross-examination witness said, that the gelding came into the range, near his house, about four years before

he was taken, as before stated; came with his dam into the range; was known as an estray. An old man from Bosque county came into the neighborhood, inquiring for stock with the same brand as the mare; authorized witness to gather them, one-half for the other. Witness took up the mare and colt; the mare died. Witness sent word to the old man, whose name he cannot remember, that he would have to keep the colt for his trouble; heard that the old man said it was all right; got this word from one who claimed to be an agent of the old man; got this information about three months after he took up the mare and colt. The mare died about two years after he took her up; had paid taxes on said gelding for the last three years; he was not branded."

Motion for new trial was overruled, and defendant appealed.

Walton & Green, for appellants.

Attorney-General, for the State.

McADOO, J.—There are two assignments of error in this case. 1. The court erred in overruling defendant's motion in arrest of judgment.

2. The court erred in overruling defendant's motion for a new trial.

We shall confine our opinion to the latter assignment. We believe a new trial should have been granted. The ownership of the property alleged to have been stolen must be proved as alleged. It would require, we think, a good deal stronger testimony than appears in the record in this case to satisfy our minds that Seth Stadden was the owner of the horse alleged to have been stolen.

We think, at best, the evidence shows the horse was an estray, and, perhaps without any authority whatever, in the possession of Stadden.

Statement of the case.

The testimony of Stadden on the subject of his possession of and claim to the ownership is extremely vague, uncertain, inconclusive and unsatisfactory. We think it entirely fails to show any title or ownership in him.

The cause is reversed and remanded.

REVERSED AND REMANDED.

ELIZA A. BROWN ET AL. V. MARY E. MOORE.

1. An officer interested in a deed cannot take the acknowledgment of the grantors in such deed.
2. The commissions of a trustee is sufficient interest to disqualify him from taking the acknowledgment to the trust deed.

APPEAL from Galveston. Tried below before the Hon. A. P. McCormick.

On the twentieth day of July, 1858, Mary E. Moore (appellee) and her husband, James W. Moore, executed and delivered to Eliza E. Brown (appellant) their note for $1100, due January 1, 1859, and secured its payment by deed of trust to Oscar Farish, executed in due form, of same date, conveying to him, in trust, lots 12, 13 and 14, block 136, with improvements, in the city of Galveston, and two slaves. On April 12, 1868, the trustee advertised the lots and improvements to be sold under the terms of the deed of trust, on April 25, 1868. The appellee, on the twenty-second day of the same month, filed her petition in the Galveston District Court to enjoin the sale. The petition had already been submitted to the judge in chambers, and he had made an order responsive to its prayer, on April 18. The allegations relied on for relief were, that the property was the homestead of petitioner

and family when the note and trust deed were made, the lots not exceeding the value of $500 each, and that it was acquired during the coverture of her said husband and self; that he died August 15, 1866, leaving three children of their marriage, and herself, the children being still minors; that the consideration of said note was a debt of her said husband, and she was an entire stranger thereto; that he died possessed of the property described, and owned no other; that the said lots are worth not exceeding $2000, and she owns an interest in no other property.

On December 9, 1868, defendants answered, denying plaintiff's right to arrest the sale; admitting the property was homestead at the time of the execution of the note and deed of trust, but alleging it to have been the separate property of the plaintiff; and admitting further the truth of the remaining allegations of the petition. The answer concludes with a prayer for the dissolution of the injunction.

By amended petition of December 12, 1870, plaintiff alleged that the lots in controversy were her separate property, and ever since their acquisition had been and then were her homestead; that the acknowledgment to the deed of trust was made before said Farish, the trustee therein named, and was therefore void, and that the allegations of her original petition were true.

It was admitted that the consideration of the note was not for the use of the plaintiff, nor necessaries for her family, nor for the benefit of her separate property, and that the allegations of the original and amended petitions respecting the homestead and its value were true.

The note and trust deed were submitted to the court. The court (jury being waived) rendered judgment March 15, 1871, perpetuating the injunction. Whereupon, defendant appealed.

Argument for the appellees.

McLemore & Hume, for appellants, cited Paschal's Digest, Article 1003; 34 Texas, 478, Howard v. Walker; 5 Texas, 200, Hollis and Wife v. Francois & Borden; 6 Texas, 103, Sampson & Keene v. Williamson; 16 Texas, 58, Stuart v. Mackey; 18 Texas, 643, Shelby v. Burtis; 26 Texas, 686, Patton v. King; 4 Allen, 440, Bartlett v. Bartlett *et al.;* Paschal's Digest, Articles 1305, 4640; 23 Texas, 180, McGee v. White; 5 Texas, 152, Cartright v. Hollis; 10 Texas, 123, Christmas v. Smith; 11 Texas, 329, Milburne v. Walker; 19 Texas, 346, Brown *et als.* v. Ector and Wife; 20 Texas, 374, McFaddin v. Cumpler; 27 Texas, 256, Hutchinson v. Underwood; 3 Johnson R., 88, 89, 90, Methodist Episcopal Church v. Jacques; Sections 347, 348, 370, 371, 372, Cord's Legal and Equitable Rights of Married Women; 2 Story's Eq., 1401; 3 Washburn R. P., 281-2, 272; 14 Wis., 683, Kimball v. Johnson; 2 Watts, 141, Bank v. Porter; 5 Iowa, 103, Dissaume v. Burnett; 20 Iowa, 231, Wilson v. Traer; 46 Mo., 404, Stevens v. Hampton; 20 Me., 431, Beaman v. Whitney; 6 N. Y., 422, Lynch v. Livingston.

Ballinger, Jack & Mott, for appellees, cited 4 Texas, 152, Catlin v. Glover; 21 Texas, 46, Gregory v. Van Vleck; 25 Texas Sup., 112, Nichols v. Gordon; 8 Texas, 51, Henderson v. Kissam; 13 Texas, 467, 468, Smith v. McGaughey; 22 Texas, 612, Coats v. Elliott; 14 Texas, 42, Young v. Epperson; 5 Texas, 195, Hollis v. Francois; 22 Texas, 628, Ross v. Bremond; 26 Texas, 744, Berry v. Donley; 28 Texas, 532, Cross v. Evarts; 12 Mod., 669, Wood's case; Comyn's Dig., Justice, 3; 5 Cranch, 367, Slocum v. Sims; 2 Mason, 252, Bean v. Smith; Crocker on Sheriffs, 2; 1 Kernam, 61, Carpenter v. Stilwell; 2 Watts, 141, Bank v. Porter; 4 Cowen & Hill's Notes, 464, 469; 13 Mich., 329, Groesbeck v. Seeley; 20 Iowa, 231, Wilson v. Traer & Co.; 5 Iowa, 103, Dissaume v. Burnett; 20

Maine, 413, Beaman v. Whitney; Tiffany on Trusts, 842; 9 Texas, 599, De Leon v. White; 23 Texas, 96, Ayers v. Henderson; 7 Watts, 227, Withers v. Baird; 46 Mo., 404, Stevens v. Hampton; Gen. Prov., Sec. 21, State Constitution; Paschal's Digest, Articles 1003, 1005; 6 Texas, 119, Sampson & Keene v. Williamson; 18 Texas, 644, Shelby v. Burtis; 23 Texas, 180, Magee v. White; 27 Texas, 256, Hutchinson v. Underwood; Act of April 30, 1846, Paschal's Digest, Art. 4640, *et seq.*; 46 Mo., 543, Klum v. Weippert; 33 Texas, 86, Westbrooks v. Jeffers; 33 Texas, 39, Blair v. Thorpe; Paschal's Digest, Articles 1305, 1339; Cord on Eq. Rights Married Women, 522; 2 Story's Eq. Jur., §§ 1402, 1407, 1411, 1414; 21 Texas, 665, Sossaman v. Powell.

WALKER, J.—James W. Moore and Mary E., his wife, to secure the payment of $1100 to Eliza A. Brown, executed a deed of trust to Oscar Farish over lots 12, 13 and 14, in block 136, in the city of Galveston, together with two slaves. The trustee took the acknowledgment of the wife to the deed. The property mortgaged was her separate property. The trustee was interested in the conveyance to the extent of his commission, and was therefore incompetent, as an officer, to take an acknowledgment of the deed. Authorities are sufficiently referred to in the able briefs of counsel to this point. We think the law is well settled; and though there are other questions raised in this record of a deeply interesting character, we will decide this case upon the point already stated, referring to our opinions in other cases for the settlement of all other questions involved. The judgment of the District Court is affirmed.

AFFIRMED.

JOHN MARTIN ET AL. v. E. A. WAYMAN ET AL.

1. Where an appeal is taken in a case of trespass to try title, and such appeal is dismissed, limitation runs from the date of the judgment in the District Court, and suit must be brought within one year thereafter, or the judgment becomes conclusive.
2. If such final judgment be rendered during the minority of the plaintiffs, then limitation runs from the removal of such disability, by marriage of a female, or majority.
3. Different disabilities cannot be tacked to prolong such exemption.
4. The act of the Legislature of the tenth of February, 1852 (Paschal's Digest, 4461), relinquishing all the right and interest of the State "in the following described lands to the original grantees thereof, their heirs, and legal assignees," conveyed no title other than a confirmation of the original titles.

APPEAL from Cameron. Tried below before the Hon. Wm. H. Russell.

This case was before the Supreme Court at its Galveston Term, 1863. (26 Texas, 460.)

To the former case we refer for statement, and to the opinion of the court.

Powers & Maxan, for appellants.—The defendants say the amendments embrace new matter, etc., and set up a new cause of action. This is not so; the record shows that this same defense was raised upon the former trial of the case. Besides, this suit was brought on the basis of the title acquired by the effect of the confirmation of the Espiritu Santo grant. That at the time of that grant the plaintiffs were not barred of any of their rights, and having the benefit of that grant by and from the State, they could use their own discretion in suing upon it.

In other words, the plaintiffs sue on an after-acquired title by force of the said confirmation.

In this respect they invoke the principles decided by the Supreme Court of the United States, in Strother v. Lucas,

12 Peters, 441 and 454 (top), wherein it is laid down, "That a grant may be made by a law, as well as a patent pursuant to a law, is undoubted (6 Cr., 128); and a confirmation by a law is as fully, to all intents and purposes, a grant, as if it contained in terms a grant *de novo*."

Now, what was the condition of things which the State of Texas sought to obviate and to establish in these confirmations? She had just brought within her fold an immense district of country, of which, in its social and material interest, she knew nothing. She was anxious, so far as possible, to render homogeneous with the balance of the State these elements; to pacify and allay the fears and apprehensions of its people; and, in a word, to cement them in their every relation into one common brotherhood. One of its first measures was to provide a board for the investigation of land titles. (Paschal's Digest, Arts. 4440 to 4455.)

This duty was performed, and the result is contained in Paschal's Digest, Articles 4459 to 4465.

There are many reasons for these provisions; not the least among them was the fact that this people had been brought violently under the political and civil jurisdiction of Texas, from a system of government and laws different from that of the parent State; the courts had to be general and uniform in the administration of justice; and a knowledge of the land titles, as well as the tenure, had to be acquired. These provisions accomplished all this.

Texas had, since December, 1836, claimed the jurisdiction she is now exercising; of course she had to pass upon what had occurred locally in this interval. The laws and government of Mexico had their limitations and restrictions in the tenure of property, as well as did those of the Republic and State of Texas. The two former were particularly onerous toward aliens. The Legislature was desirous of legalizing the actual tenures as a measure

of simple and common justice. By these general confirmations they did this. In order to secure justice in this respect they adopted the *status* of persons and things as they had stood under the Mexican *regime;* in this way no injustice or violence was perpetrated on any man's rights, and the transition of authority and allegiance thus effected was peaceful and happy.

Now then, with these premises, under the confirmation, did not the position of plaintiffs, as legal assignees under this grant, remain unchanged? Did the Legislature do an idle thing in this confirmation, or has it changed, in any respect, the rights of the defendants? In no sense of the word are, or were, they legal assigns, nor do they so pretend.

The plaintiffs show in what way they are legal assigns under this grant; they allege that their ancestor, by the judgment of a Mexican court of competent jurisdiction, acquired the property in question; that he bid it in, and was placed in judicial possession. Now no objection is urged against the jurisdiction of that court, nor other impediment alleged. Indeed, the jurisdiction is affirmed by this court in several adjudged cases. (See Martin v. Wayman, 26 Texas, 460; Trevino v. Fernandez, 13 Texas, 630.)

In the case above cited (Strother v. Lucas, 12 Peters, 437), the court says: "No principle can be better established by the authority of this court than that the acts of an officer to whom a public duty is assigned by his king, within the sphere of that duty, are *prima facia* taken to be within his power," etc. And further: "The same rule applies to the judicial proceedings of local officers to pass the title of land, according to the course and practice of the Spanish law in that province." (8 Peters, 310.) "Where the act done is contrary to the written order of the king, produced at the trial, and without any

explanation, it shall be presumed that the power has not been exceeded; that the act was done on the motives set out therein, and according to some order known to the king and his officers, though not to his subjects."

These principles point out only some of the motives for upholding the solemn adjudications of courts of justice in the exercise of their common jurisdiction. In this regard the English and American doctrine is the same; the record perforce is made to imply "absolute verity."

We consider, then, that by the adjudication of the Mexican court, Robert Gilmore took what the court gave him, the legal title to the land in question; that, as such, he was a legal assign, and transmitted this quality to his daughters, the plaintiffs, and that they, in virtue of this, are beneficiaries under the confirmation as the foundation of this suit. (Stoddard *et al.* v. Chambers, 2 How., 284; Massey *et al.* v. Papin, 24 Howard, 362.)

The ground of objection to the plaintiffs' amended petition that we are now considering is, that while the plaintiffs claim or deraign title from John Stryker, they impeach his title and capacity to hold.

This is not so. We simply assert that in no sense can the defendants show themselves to be the legal assigns of this land, and we instance as one reason therefor that said Stryker could not impart to them a title, neither by the laws of Mexico, nor by those of the Republic of Texas, by reason of alienage; for by the laws of neither of these States could aliens acquire and hold real estate at the period herein involved. (Clay v. Clay, 26 Texas, 24.) He lacked, therefore, the capacity to transmit such estate.

At most and at best the interest held by Stryker in this land was defeasible; the proof of this is that the court condemned and sold it. Now it is a principle of the English law, in cases where aliens hold the title to real

estate, in order to avoid a confiscation or escheat, to treat such estate as a trust interest, and not as a fee, and so allow the party the benefit of its proceeds. But will any one pretend that such an owner of the fee in England could transmit it to his heirs? By no means; and in this sense was the allegation in the amended petition, and no more.

We consider that we have sufficiently examined the pleadings and the rulings of the court in this case to show that the court erred in sustaining defendants' objections to the plaintiffs' amended petition, and that such ruling should be reversed.

Now, as to the order of the court in dismissing the suit in passing on the defendants' exceptions, without putting the defendants to their proof, we consider that the court also erred. The unbroken current of the decisions of this court is to the effect of *respondeat ouster* in judgments on demurrer, unless the party declines further to plead or amend. (See Cook v. Crawford, 1 Texas, 9; Perry v. Rice, 10 Texas, 367; Jennings v. Moss, 4 Texas, 452; Portis v. Hill, 3 Texas, 273; Sasser v. Davis, 27 Texas, 657; Thompson v. Eanes, 32 Texas, 190.)

Hancock & West, for appellees.

WALKER, J.—In our discussion of this case we will reverse the order in which counsel present the different points raised upon the record.

As to the act of February 10, 1852 (Paschal's Digest, 4461), we cannot see how that act could affect the rights of the parties to this suit. It was simply intended to relinquish all the right and interest of the State (if it had any), to Jose Salvador de la Garza, in 59½ leagues of land known as El Espiritu Santo grant.

It did not, in our judgment, in any way affect the legal

status of the parties to this suit, and the judgment of the District Court to this effect we think correct.

This case was once before passed upon by this court, and from this circumstance arises the most difficult questions herein to be determined. None of the questions involved in the former case are presented; but the submission of the record, in No. 988, led to some confusion, and the labor of writing an opinion predicated solely upon the issues presented in that case. We can only look upon this as labor lost, and we now address ourselves to the points involved in this case.

The suit appears to have been filed on the tenth of March, 1855. On the eighth of August, 1871, the appellees, defendants below, filed an amended answer, setting up the plea of *res judicata;* also, that the former adjudication was upon the merits, and that the present action was barred by limitation.

The plaintiffs below filed special exceptions, and, without waiting for a judgment of the court on these exceptions, the appellees filed a plea in avoidance, setting up the removal of the appellants' disability of minority, and averring that the statute of limitations was a bar to this suit.

The appellants again excepted, and the court overruled the exception. This was followed by an amended petition, setting up the act of the tenth of February, 1852, as a source of title to the appellants. (Paschal's Digest, 4461.) To this petition the defendants demurred. The demurrer was sustained, and the plaintiffs not asking to amend, the judgment was rendered for the appellees, from which this appeal has been taken.

We must now, in order to test the correctness of the rulings of the court, examine into some of the facts of the case. In the former suit, we think undoubtedly, there was a trial upon the merits before a jury, who re-

turned their verdict for the appellees, and the judgment followed.

This trial appears to have taken place on the eleventh of October, 1849.

An appeal was taken to this court, but for some reason or other the appeal was not prosecuted; and the cause was dismissed on the twenty-eighth of May, 1850. One year was allowed the appellants in which to bring a new suit, but this suit was not filed until the tenth of March, 1855.

But it is answered that at the time the case was dismissed by the Supreme Court the appellant, Mary Gillmore was a *feme covert*, and that the statute did not run against her.

It appears that she was married on the twentieth of October, 1849—only a few days after the trial of the cause in the District Court. She was a minor at the time, but her marriage removed her minority. Article 5299, Paschal's Digest, says, in case a verdict and judgment pass against the plaintiff, and he determine to appeal to the Supreme Court, and the Supreme Court should decide against him, he, the said plaintiff, shall have one year from the decision of the Supreme Court in which to bring a new action.

The dismissal of a cause by the Supreme Court cannot be regarded as a decision.

We are of opinion that when the first suit was dismissed by the Supreme Court the statute of limitation had then run from the eleventh of October, 1849, the date of the trial in the District Court. At that time both of the appellants were minors, but they soon after married. By their marriages they removed the disability of minority, and it is a settled principle of law that the operation of the statute cannot be defeated by tacking one disability upon another.

Syllabus.

Mary Gilmore married on the twentieth of October, 1849; her sister, Agnes, married on the twelfth of September, 1850. We are then of opinion that this suit should have been brought before the twelfth of December, 1851.

This, then, brings us to the conclusion that the plea of *res judicata* was properly sustained by the court below. But the appellants, in an amended petition, set up that they were non-residents at the time the first suit was decided against them, and were therefore entitled to two years in which to bring their second action; and that before the expiration of that time the Legislature had granted them the land. This amended petition was demurred to, and, as we have already stated, the demurrer was sustained, in our judgment, properly.

This disposes of everything in this case which we deem it important to notice, and for the reasons given we affirm the judgment of the District Court.

AFFIRMED.

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38 656
87 148

G. W. STEPHENS v. BEN. HIX.

1. If the plaintiff demur to the evidence of the defendant, and the defendant join in the demurrer, the question of fact upon the evidence is cast upon the court; and, on appeal, the court will render such judgment as the testimony warrants.
2. A demurrer to evidence is analogous to a demurrer in pleading, the party from whom it comes declaring that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue.
3. Where both parties claim title under a common source, and plaintiff shows title from such common source, and that defendant is in possession, such evidence is sufficient, and it devolves upon the defendant to show either the nullity of plaintiff's deed, or prove a superior title in himself.

APPEAL from Johnson. Tried below before the Hon. Charles Soward.

Statement of the case.

This was an action of trespass to try title for twenty-five acres of land, brought by appellant against Ben. Hix and Nancy Page.

Plaintiff alleged that Mrs. Page and one John P. Bailey had combined to defraud W. C. Philips of the land; that Bailey had a general power of attorney from Philips, of date twenty-third of July, 1859; that at breaking out of the late war, Philips had left the country, and in his absence within the lines of the United States forces, the said Bailey had, in disregard of rights of Philips, sold said land to Mrs. Page for Confederate notes; that said power of attorney was revoked by the said civil war, and that said sale for Confederate States paper was without authority; that after the close of the war Philips had sued Bailey and Page, to set aside said transaction, and that in said suit judgment by default went against Bailey; and that Mrs. Page, having heard that Philips was about bringing suit, had sold the land to the defendant, Ben. Hix, with notice, and *disclaimed* title.

The defendant set up title by purchase from Mrs. Page, she purchasing of Bailey, attorney for Philips.

The plaintiff on trial read the deed from Philips to him, and the proceedings in Philips v. Page, and showed that defendant, Hix, was in possession.

The defendant read his deed from Mrs. Nancy Page, and closed.

The plaintiff demurred to the evidence of the defendant, and the defendant joined in demurrer.

The court sustained the demurrer to the testimony of both the defendant and plaintiff, and rendered judgment for the defendants.

The plaintiff appeals.

A. Bradshaw, for appellant, cited 2 Kent, p. 68; 26 Texas, 731, Wright v. Dailey; 28 Texas, 443, Alexander

v. Ransom; 34 Texas, 441, Rogers v. Burchard; 32 Texas, 803, Harwood v. Blythe.

No brief filed for appellee.

OGDEN, P. J.—On the trial of this cause, after the evidence of both plaintiff and defendant had closed, the plaintiff demurred to defendant's testimony, and the defendant joined in the demurrer; thereupon the court withdrew the cause from the jury, and decided the same upon the demurrer. This, says Bouvier, is the correct practice, and he refers to Arch. Prac., 186, and other authorities, as supporting the rule enunciated. He further says, that "A demurrer to evidence is analogus to a demurrer in pleading, the party from whom it comes declaring that he will not proceed, because the evidence offered on the other side is not sufficient to maintain the issue."

The parties having demurred to each other's evidence, it then became the province of the court to determine whether either plaintiff or defendant had sustained the allegations of their pleadings by their proof. It appears that the court sustained the demurrer to the evidence of both plaintiff and defendant, and rendered judgment for the defendant, and the plaintiff has appealed, and assigned the judgment as error; and this is the only assignment which need be noticed.

It appears that both plaintiff and defendant claim title to the land in controversy through W. C. Philips as a common source, and on the trial the plaintiff introduced in evidence a deed direct from Philips to himself, conveying to him the land in controversy. He then proved that the defendant was in possession of the land. We think this evidence clearly sufficient to authorize a judgment for plaintiff, unless the defendant by his evidence established

the nullity of plaintiff's deed, or proved a superior title in himself.

The object of the plaintiff in introducing a transcript from the records in the case of Philips v. Page is not clearly perceived; but that, at least, could do the plaintiff's cause no harm, and his other evidence was sufficient to establish a *prima facie* case.

The defendant, Ben. Hix, then introduced a deed from Page to him for the land in controversy, and closed without proving up any connection whatever of his or the Page title with that of Philips, under whom they both claim. This evidence was certainly defective, and insufficient to establish any title, or to defeat the *prima facie* title established by the plaintiff.

The court did not err in sustaining the demurrer to defendants' evidence; but there was error in sustaining the demurrer to the plaintiff's evidence.

On the contrary, we think the court should have rendered a judgment for the plaintiff.

And as the cause below was submitted to the court upon the law and the facts of the cause, this court will here render such a judgment as should have been entered below.

The judgment of the District Court is therefore reversed, and a judgment will be entered for the plaintiff below and appellant here.

REVERSED AND RENDERED.

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ABANDONMENT.

HOMESTEAD, 1, 8.

LAND, 7.

The question of abandonment is almost exclusively one of intent, and that intent must be clearly established by the best accessible evidence, before the jury will be authorized to find a relinquishment of any rights under the homestead law. That a party has been absent for an indefinite period is not sufficient, unless accompanied with proof of intent not to return. *McMillan* v. *Warner*, 410.

ABATEMENT.

In a suit by the legal owner of a promissory note for use of the administrator of an estate, the incapacity of the administrator to sue or to act in the capacity of administrator cannot be pleaded in abatement. *Hilson* v. *Dillahunty*, 585.

ACCOUNT.

PLEADING, 13.

In a suit upon an account, a petition failing to contain a bill of particulars, does not set out the plaintiff's cause of action in a clear and intelligible manner, and is defective. *Boynton* v. *Chamberlain*, 604.

ACKNOWLEDGMENT.

1. An officer interested in a deed cannot take the acknowledgment of the grantors in such deed. *Brown* v. *Moore*, 645.

2. The commissions of a trustee is sufficient interest to disqualify him from taking the acknowledgment to the trust deed. *Id.*

ADMINISTRATOR.

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AMENDMENT.

PRACTICE, 16.

APPEAL.

1. No appeal lies to the Supreme Court from a judgment rendered in the District Court in a case which had been appealed from the court of a mayor or justice of the peace. *Burch* v. *Corporation of Bastrop*, 80.

APPEAL—*Continued.*

2. The 21st Section of the Act of October, 1866, prohibited appeals to the Supreme Court in cases appealed to the District Court from the County Court, in judgments less than two hundred dollars. The repeal of said act did not confer additional jurisdiction over cases pending in said courts. *Meriweather* v. *Whitley*, 525.

3. Appeal dismissed, it being from a judgment less than two hundred dollars, and in a case appealed from the County to the District Court. *Id.*

4. The refusal of the district judge to forfeit a recognizance is an interlocutory order from which no appeal can be taken. *The State* v. *Butler*, 560.

5. Appeal does not lie from the action of the District Court in overruling a motion for new trial in a criminal case. *Fulcher* v. *The State*, 505.

6. In this case the jury found the defendant guilty of rape; thereupon the court remanded the defendant to jail to await sentence. A motion for a new trial was overruled and an appeal taken. *Held*, that the Supreme Court had no jurisdiction on appeal. *Id.*

7. *Hoppe* v. *The State*, in 32 Texas, overruled. *Id.*

APPEAL BOND.

PRACTICE, 2.

ATTACHMENT.

PARTNERSHIP, 4.

Stock in a corporation is not subject to attachment. *M. M. Ins. Co.* v. *Brower & Co.*, 230.

ATTORNEY.

An attorney has no power to change the securities of his client unless he be the attorney in fact specially authorized so to do. *Scott, Admx.*, v. *Atchison*, 384.

AUDITOR.

PRACTICE, 14.

BAIL BOND.

SCIRE FACIAS, 1, 2.

1. A bail bond which describes A. B. as principal, "conditioned, that whereas an indictment has been preferred against A. B.," etc., "now if the above bounden ———— shall make his personal appearance at the next term," etc., if in other respects good, is not vitiated by the failure to insert the name of A. B. after the word "bounden," but may be enforced as the bond of A. B. *Gorman* v. *The State*, 112.

2. A recognizance is defective which recites that defendant shall "appear from day to day, and from term to term, and abide the decision of

BAIL BOND—*Continued.*

the Supreme Court, and not depart without leave," without stating when and where he shall appear. *Maxwell* v. *The State*, 171.

3. A bail bond is fatally defective which does not require the defendant to appear at any particular place or county, to answer the charge against him; and it is error to render judgment final by default upon *scire facias* based on such bond. *Ward & Hamilton* v. *The State*, 302.

4. A bail bond must show to what court the defendant is bound to appear. *The State* v. *Phelps*, 555.

5. A bail bond binding the defendant to appear in Refugio county and forfeited in the District Court of Aransas county, the judgment *nisi* and *scire facias* describing the bond as obligating defendant to appear and answer in Aransas county—*held*, such misdescription is fatal. *Cushman* v. *The State*, 181.

6. It is not necessary in a bail bond that the venue of the offense named be stated therein. *Cundiff* v. *The State*, 641.

7. It will not vitiate a bail bond that it expressly requires the principal to appear from day to day, etc. *Id.*

8. There is no time fixed by law for the filing of the bail bond; it is sufficient if it be in court and on file before trial. *Id.*

BANKRUPTCY.

An adjudication of bankruptcy against a defendant ousts the jurisdiction of the State courts over the bankrupt and his estate. *Taylor* v. *Bonnett*, 521.

BILLS OF EXCHANGE.

PROMISSORY NOTE.

1. The words, "A. B., please pay the above bill," written and signed upon an itemized account, do not constitute a negotiable instrument. *Platzer* v. *Norris & Co.*, 1.

2. If the drawee in a bill of exchange be insolvent at its date, the drawer is liable without diligence. *Id.*

3. Suit to the first term is a substitute for presentation, protest and notice; and where the latter is excused, it is not necessary to bring suit to fix the liability of the drawer. *Id.*

BILL OF REVIEW.

INJUNCTION, 2.

BURDEN OF PROOF.

TRESPASS TO TRY TITLE, 9.

Where the petition alleges that the defendant executed through his agent the instrument sued on, though the name of the defendant be not signed thereto, the burden of proof is upon the defendant to show that he did not sign it, or authorize it to be executed, in the absence of a plea of *non est factum* under oath. *Sessums* v. *Henry*, 37.

CHALLENGES.
CRIMINAL PROCEDURE, 8, 9, 10, 11.

CHAMPERTY.
There is no law prohibiting champerty in force in this State. *Bentinck* v. *Franklin*, 458.

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COMMISSIONS.
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COMMUNITY PROPERTY.
HOMESTEAD, 5, 6.

COMPROMISE.
ESTATES OF DECEDENTS, 4, 7.

CONFEDERATE MONEY.
CONTRACT, 15. NOVATION, 1.
INNOCENT PURCHASER, 2. PARTNERSHIP, 6.
1. Confederate notes cannot be allowed to have had any value. *Kyle* v. *House*, 155.
2. Executory contracts made by guardians, executors or trustees, and payable in Confederate notes, may be enforced for the use of the beneficiaries; but the defendant may reduce the recovery to the actual value of the property or other consideration for which the obligations were given. *Thompson* v. *Bohannon*, 241.
3. It is error to render judgment by default final for the alleged value of a contract payable in Confederate bills; proof should be introduced of such value. *Id.*
4. A judgment upon a contract on its face payable in Confederate bills may be enjoined, even after twelve months from the date of the judgment. *Id.*
5. Suit may be maintained on an obligation payable in Confederate notes by an executor, administrator, guardian or other trustee, for the use of the beneficiary, but the defendant may reduce the amount to the *value* of the consideration of the obligation sued on, upon alleging and proving such value. *Shearon* v. *Henderson*, 245.
6. Payments made to an executor in Confederate money do not extinguish the debt. *Scott, Administratrix*, v. *Atchison*, 385.

CONFEDERATE MONEY—*Continued.*

7. The courts will not disturb executed contracts, nor compel specific performance of executory contracts made for Confederate money. *Johnson* v. *Byler*, 606.

CONSIDERATION.

A precedent debt even barred by limitation may form a consideration for the conveyance of property, and if adequate in amount, and the transaction be otherwise in good faith, the sale will be supported. *Shearon* v. *Henderson*, 245.

CONSTITUTIONAL LAW.

LAND, 9.

MARITAL RIGHTS, 3.

TAXES, 2.

1. It was competent for the people, in adopting their organic law, to declare a suspension of the statute of limitation. *Bentinck* v. *Franklin*, 458.

2. The 43d Section of Article 12 of the Constitution has reference to the time in which civil actions may be commenced in the State courts, and does not apply to matters of practice in the courts relating to actions therein pending. *Hart* v. *Mills*, 513.

3. The Legislature has power to authorize the holding of special terms of District Courts, for the trial of criminal causes. *Hardin* v. *The State*, 597.

CONSTRUCTION.

LAND, 13, 16.

1. It is a recognized canon of construction of wills to ascertain the object, design, or purpose of the testator, by reason and consistency. *Tendick* v. *Evetts*, 275.

2. *Quære:* Whether the rule in Shelley's case is obligatory as applied to wills? *Id.*

3. The manifest intention of the testator will control the rule in Shelley's case if in conflict with it. *Id.*

4. Under a will which recites, "After all my lawful debts are paid and discharged, the residue of my estate, real and personal, I give and bequeath to, and dispose of as follows, to-wit, to my sister, Mary A. Stuteville," followed by a description of the property; after which, "And all the above described property I give and bequeath to the said Mary A. Stuteville, and her heirs, during her natural life," the devisee takes only a life-interest. *Id.*

CONTEMPT OF COURT.

1. When a person is charged with a contempt of court, which is not committed by act in the presence of the court, or so near it as to interfere with the administration of justice, no final punishment should be-

CONTEMPT OF COURT—*Continued.*
assessed against him until after he has been cited to show cause why he should not be punished for contempt, and notified by the citation of the matter charged against him. *Ex parte Ireland*, 344.

2. A party cited to show cause why he should not be punished by the District Court for filing an offensive brief or paper, may rest upon his exceptions to the sufficiency of the citation, if it fails to charge that he wrote, signed or filed the offensive brief or paper. *Id.*

3. A judgment of the District Court imposing a fine for contempt, which purports to have been rendered on a day when the court held no session, is void. *Id.*

4. And a judgment rendered on return of *scire facias* to the party charged, requiring him to show cause "why he should not be fined as he had before been" by said void judgment, is also void. *Id.*

CONTINUANCE.

1. Counter-affidavits controverting the allegation of due diligence in obtaining the testimony of witnesses will be heard on application for the second or third continuance. *Bryce & Lyman* v. *Jones*, 205.

2. It is not a sufficient excuse for failure to obtain an attachment for a witness, that his fees had not been tendered; and as an attachment is necessary to enforce the attendance of the witness neglecting the subpœna, it follows that it is necessary to show the tender to the witness of his fees, upon application for continuance on account of his absence. *Id.*

3. A second application for continuance by a defendant in a criminal cause on account of the absence of a witness residing in the county, who had attended in obedience to a subpœna at the former term, but for whom no attachment had been issued or applied for during the three days which had elapsed of the term at which the application is made, does not show due diligence. *Holland* v. *The State*, 474.

4. On a second application for continuance by the accused, when the absence of the witness is stated in the affidavit to be on account of sickness, the character or effect of the disease should be stated in the affidavit, or set forth in an affidavit of the physician, or some other person. *Id.*

5. The statement in an affidavit for continuance on account of the absence of a witness that the absent witness would "contradict and expose the witness A. B.," without stating how, is too vague and indefinite. *Id.*

CONTRACT.

CONFEDERATE MONEY, 2
FRAUD AND FRAUDULENT CONVEYANCES, 1, 2.
HOMESTEAD, 16, 17.
NOVATION, 1
PRESUMPTIONS, 1, 2.
PAYMENT, 1, 2.

1. A proposition in writing to deliver a specific article, "*not to exceed*

CONTRACT—*Continued.*

two hundred tons," and with no other stipulation as to quantity, payment to be made on the delivery of designated installments, which is accepted in writing, confers no right upon the party accepting to enforce delivery to the limit mentioned, and leaves it optionary with each party to avoid the agreement on giving notice to the other, at any period during the time of delivery. *H. & T. C. R. W. Co.* v. *Mitchell*, 85.

2. Under such an agreement, the party making the proposition is not bound to deliver, and the one accepting is not bound to pay, to full amount of the limit. *Id.*

3. The measure of damages under such a contract is the contract price of the amount delivered before notice to stop delivery, and such actual damage as may result from notice to stop. *Id.*

4. The party who seeks redress against another for the breach of contract is bound to use due diligence himself in preventing, as far as possible, the loss by reason of the breach. *Id.*

5. A receipt purporting to be a settlement between parties is conclusive on them, unless it be shown that it was obtained by fraud, or under a mistake, or upon some condition. *Adriance* v. *Crews*, 148.

6. An obligation to pay a specified amount "in a good, solvent, cash note," becomes a moneyed demand for the amount mentioned, upon failure to deliver the note called for by the obligation within a reasonable time. *Grant* v. *Burleson, Patterson & Co.*, 214.

7. A postnuptial obligation executed by the husband for the use of the wife, to pay money in consideration that the wife would live with him, cannot be enforced. *Roberts* v. *Frisby*, 219.

8. B. executed a deed of trust conveying his steam mill, situate on land which did not belong to him, to C., who gave his consent for the removal of the old engine; a new portable steam engine was placed in the mill by B., who had purchased the same from D., under an unrecorded contract that it should remain the property of D. until paid for. *Held*, that until paid for the new engine was not subject to sale under the deed of trust. *Christian & Co.* v. *Bunker*, 234.

9. If property be delivered by the maker to the payee of a promissory note upon a written contract prescribing conditions by which the proceeds of said property are to be applied as a credit upon the note, such delivery at once goes to the credit of the note. The amount of credit is to be determined by the contract of delivery; and any subsequent misunderstanding as to the terms of such contract will not render the proceeds subject to garnishment at suit of another creditor. *Duble* v. *Batts & Dean*, 312.

10. Telegrams communicating an offer and accepting the same, when acted on, form a contract, governing the acts of the parties under the stipulations of the telegrams. *Id.*

11. A binding legal contract cannot be discharged by the promise to do, or the actual performance of, an illegal act. *Scott, Admx.*, v. *Atchison*, 384.

CONTRACT—*Continued.*

12. In a conditional exchange of property, if the contract is not executed in a reasonable time, the party not in default may rescind and recover back the property so contracted to be exchanged. *Joplin* v. *Fleming*, 526.

13. The sale of property in Texas in May, 1861, by an agent residing in Texas, whose principal was residing at the time in Illinois, was not illegal as between such agent and the purchaser; and the principal, after the close of the war, can maintain his action for the agreed purchase money against such purchaser. *McCormick* v. *Arnspiger*, 569.

14. An agent in Texas, having property of his principal even after the non-intercourse proclamation, would be chargeable with a trust therein; and should he sell such property, the principal, at close of the war, could enforce such contract against the purchaser with notice of all the facts. *Id.*

15. Payment to a Confederate States Receiver cannot be pleaded in satisfaction in a suit brought by the owner. *Id.*

CONVEYANCES.

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CRIMINAL LAW.

DEADLY WEAPONS, 1, 2.
TRIAL BY JURY.

1. There is now no penalty affixed by law for selling spirituous liquors in quantities less than a quart, the only penalty which can be enforced being for failure to pay occupation tax. *Gorman* v. *The State*, 165.

2. The act prohibiting the carrying of deadly weapons was not intended to prevent persons traveling in buggies or carriages upon the public highway from placing arms in their vehicles for self-defense; or from carrying them from place to place for other innocent purpose. *Maxwell* v. *The State*, 170.

3. A traveler is not compelled to lock his arms in his trunk or valise, where they would be useless to him if attacked. *Id.*

4. See this case for circumstantial evidence held sufficient to authorize a conviction for murder. *Holland* v. *The State*, 474.

5. There may be other adequate causes which will reduce a homicide from murder to manslaughter beside the four provoking causes enumerated in Article 2254, Paschal's Digest. *Brown* v. *The State*, 482.

6. On a trial for murder, where there is evidence of malpractice on the part of the surgeon who attended the deceased, the jury should be instructed that they cannot convict of murder unless satisfied that the death resulted from the wound, and not from the malpractice of the surgeon. *Id.*

CRIMINAL LAW—*Continued.*

7. Proof by general reputation in the community that a house is kept for public prostitution is sufficient to sustain a prosecution for keeping a disorderly house. *Morris* v. *The State*, 603.

8. Section 54, of Chapter 78, approved the fifteenth of August, 1870, providing, that "if any person shall, by bribery, menace, willful falsehood, or other corrupt means, attempt to influence any elector in this State, in giving his vote or ballot, or to induce him to withhold the same * * * at any election in the State, he shall, on conviction thereof, be deemed guilty of a misdemeanor," etc., extends to the protection of the elector in an election for Congressmen, as well as for State or county officers. *The State* v. *Franks*, 640.

9. It is immaterial whether an election was for Congressmen or for State officers, under the statutes; the election was being held under the laws of this State, and the offender is punishable. *Id.*

CRIMINAL PROCEDURE.

CRIMINAL LAW, 6. NEW TRIAL, 4.
INDICTMENT. TRIAL BY JURY, 1, 2, 3.
LIMITATIONS, 2. VERDICT.

1. The discretion confided in the Judge by Article 3046, Paschal's Digest, in allowing testimony to be introduced on the trial of a criminal cause at any time before the argument of counsel is concluded, will not be made the subject of revision in the appellate court, unless it appear that the discretion has been used to defeat the ends of justice. *Kemp* v. *The State*, 110.

2. On trial under a charge for driving cattle from their accustomed range, without consent of the owner, evidence that the defendant acknowledged to the inspector that he had no bill of sale from the owner, and turned the cattle loose, that he again gathered the same cattle, and afterwards confessed in another county to which he had driven them that he had no bill of sale,—*held*, sufficient evidence of want of consent of the owner, in the absence of evidence, on the part of defense of authority from the owner to drive. *Id.*

3. Under the statute of May 22, 1871, entitled "An act to encourage stock raising and for the protection of stock raisers," imposing certain fines recoverable before the District Court or any justice of the peace having jurisdiction, one half of the fine to be paid to the informer, and the other half into the county treasury: *Held*, that indictment will not lie, but proceedings should be upon the relation of the informer. *Garcia* v. *The State*, 543.

4. Under said act the fines can only be enforced in a *qui tam* action, prosecuted for the uses expressed in the statute. *Id.*

5. Where the court is satisfied that a defendant who is taken sick during his trial on a charge of felony is too unwell to be present in court at every stage of the trial, the cause should either be temporarily continued,

CRIMINAL PROCEDURE—*Continued.*

to await his convalescence, or a juror withdrawn and the cause continued. *Brown* v. *The State*, 482.

6. A paper purporting to be an indictment, but not signed by the foreman of the grand jury impanneled at the term of its filing, may be signed by him at a subsequent term. *Bassham* v. *The State*, 622.

7. A defendant cannot, when the jury is being polled, question a juror in regard to the misconduct of the jury during trial. *Id.*

8. Prescribing rules for impanneling juries in State cases. *Cooley* v. *The State*, 636.

9. No challenge should be made until the panel is full; nor is it proper to make more than one peremptory challenge at the same time. *Id.*

10. Less than twelve men will not constitute a jury in State cases, and challenges should never be made except from a full jury. *Id.*

11. The proper mode of selecting a jury is to proceed by trial or examination until twelve qualified jurors are found; then the party holding the affirmative of the issue should be required to pass upon the jury; should he pass upon it without challenge, the party holding the negative of the issue is then called upon to pass upon it. Should either party make a peremptory challenge, another juror must be called, who, if qualified, takes his seat in the box, when the peremptory challenging may proceed. *Id.*

DAMAGES.

CONTRACT, 3.

The owner of property seized under an attachment wrongfully sued out, is entitled to recover as actual damages the value of the use of the property while it is withheld from his control. His right to such recovery is not affected by the fact that the property had been replevied, and remained under control of his co-defendant, who had no right to the same. *Munnerlyn* v. *Alexander*, 125.

DEADLY WEAPONS.

CRIMINAL LAW.

1. The permission given by the law for one to bear arms "on his or her own premises, or at his or her own place of business," will not authorize the carrying of deadly weapons in the woods while hunting stock. *Baird* v. *The State*, 599.

2. The "place of business" contemplated by the act has reference to some particular locality, appropriated exclusively to a local business; such as the farm, the store, the shop, or dwelling place. *Id.*

DEED OF TRUST.

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DESCENT AND DISTRIBUTION.

HOMESTEAD, 5, 6.

DISTRICT COURT.

1. A District Court has authority to enter *nunc pro tunc* an order of a former term, omitted from the minutes by mistake of the clerk. *Miller* v. *Richardson*, 500.

2. There should be some memorandum in writing of such action among the papers of the cause, to authorize entry of such order or judgment of the former term. *Id.*

3. The entry of the judge upon the motion docket at a former term is such memorandum as would authorize the entry of the same upon the minutes of a subsequent term. *Id.*

DIVORCE.

In a suit for divorce all questions of property between the parties should be settled; if not then settled they are considered as waived, and such waiver is final. *Hardin* v. *Hardin*, 616.

ELECTIONS.

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PROMISSORY NOTES, 5, 6.

ESTATES OF DECEDENTS.

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JURISDICTION, 6.
PARTIES, 3, 4, 5, 6.
PRACTICE, 27.

1. No judgment can be rendered against the representative of the estate of a deceased person binding on the estate, unless the defendant be sued in his representative capacity. *Lewis* v. *Nichols*, 54.

2. Execution can never issue against the estate of a deceased person, except when the estate is withdrawn, by the will, from the jurisdiction of the probate court. *Id.*

3. A provision in the will exempting the executor from giving bond will not of itself authorize the issuance of execution against the estate in his hands under a judgment against the executor; it can only be authorized where the petition avers and the evidence shows that the estate is excluded from the jurisdiction of the probate court. *Id.*

4. When an executor makes a valid compromise of a debt against the estate of his testator, by giving to the creditor property which belonged to the executor in his individual right, he is entitled to be subrogated to the rights of the creditor, and will be entitled to share the assets *pro rata*. *Id.*

5. On the second of April, 1844, there was no law requiring a land certificate sold at administrator's sale to be sold at the court house door of the county in which the land was situated upon which the certificate was located; before the issuance of patent, the interest of the owner in

ESTATES OF DECEDENTS—*Continued.*

the certificate being but a chattel interest, the same could be sold as other personal property. *Melton* v. *Turner*, 81.

6. An administrator who is himself a creditor of the estate he represents, cannot charge the estate, in payment of his own debt, the five per cent. allowed to administrators by law for paying out money to creditors. *Brown* v. *Walker's Heirs*, 109.

7. An administrator made a settlement with a creditor of the estate by paying a *pro rata* upon the claim and taking a receipt in full. Such settlement would bind the creditor, in absence of fraud, mistake, or of evidence that it was conditional. *Adriance* v. *Crews*, 148.

8. If a creditor is induced by the misrepresentations of an *heir* to compromise his claim with the administrator for a less sum, his remedy would be against such heir. His interest is sufficient consideration to bind him to make good his representation. *Id.*

9. Where an executor took possession of a claim against his decedent's estate, not barred by limitation, promising to allow and pay it, but after holding it until he believed it barred, returned it disallowed—*held*, that suit within three months after such rejection was in time. *Kyle* v. *House*, 155.

10. Under the probate act of 1870, no administration can be granted after four years have elapsed from the death of the intestate. *Loyd* v. *Mason*, 212.

11. After that time has elapsed the presumption is that there are no debts, or if any, that they are barred by limitation, and that the property has gone into the possession of the person entitled to receive it. *Id.*

12. It seems that the surviving member of a firm owning a steam mill has authority to make all necessary repairs, under order of the probate court, and to charge the property with the expense. *Cock, Adm.*, v. *Carson & Lewis*, 284.

13. An administrator will not be allowed to pursue such a course in the management of the trust in his hands as will result in gross injustice to other parties. *Id.*

14. An administrator *de bonis non* will not be permitted to repudiate the contract of his predecessor in the trust, without compensating the party injured for all loss induced by the contract. *Id.*

15. An executor cannot change the character of the trust fund held by him without the order of a court having chancery jurisdiction; without such order he cannot make a novation of an old debt for a new one. *Scott, Admx.*, v. *Atchison*, 384.

16. Support and maintenance out of the general estate adjudged, instead of the minor's individual estate, under the following clause: "It is my earnest wish and desire that my executors, hereinafter named, shall take the custody and guardianship of all my minor children, and to them, under God, I commit them, requesting that, if their lives are spared, they shall be well and thoroughly educated and fitted for usefulness and for the active duties of life; and I desire and direct that so much of my es-

ESTATES OF DECEDENTS—*Continued.*

tate as shall be deemed requisite shall be reserved from division to defray the expenses necessary to the proper education of all my minor children." *Alexander* v. *Thompson*, 588.

The amount of the judgment prayed for is taken as test of jurisdiction in a suit brought in the county court in 1868. *Id.*

17. The allowance and approval of a note by the Probate Court as a claim against an estate is a *quasi* judgment, and can only be attacked as other judgments. *Cannon* v. *Bonner*, 487.

18. The action of the Probate Court setting aside a homestead is conclusive except when directly attacked. *Id.*

19. An order of the probate court made in 1849, setting aside to the widow $2000 "as an allowance secured to her by the Constitution of the State," for the benefit of herself and children, and permitting her to receive in part payment thereof the lots and buildings occupied as a homestead, was void for want of power in the court. *Newcomb* v. *Hall's Heirs*, 561.

20. The widow acquired, under such an order, no title to property taken at the appraised value on the inventory, to satisfy such an allowance. *Id.*

21. Nor could third parties who were purchasers at a sale made to satisfy said allowance acquire any title by their purchase, though the sale was reported on and confirmed by the probate court. *Id.*

22. The estate of minors goes into their hands subject to all liabilities incurred by their guardian in managing such property. *Owens* v. *Mitchell*, 588.

23. Suit was properly brought against the guardian, who incurred the liability, and against his wards after they have received their property; and especially has plaintiff such right upon showing the insolvency of the guardian. *Id.*

24. It is not necessary that accounts for expenses necessary in the management of the estate of a minor, incurred by the guardian, be presented for allowance authenticated as claims presented to an administrator. *Id.*

25. Under Section 6 of act of May 23, 1871, an administrator against whom a motion has been made to compel a new bond, has, notwithstanding the service of notice of such motion, the right to prosecute suit to final judgment, unless he had been finally removed from the administration. *Hitson* v. *Dillahunty*, 585.

26. Such administrator would not have authority to institute suit after such service of notice, but would have the right to prosecute suit or do any other act having for its direct object the saving the estate from loss or damage. *Id.*

27. To authorize the sale of land under the Probate Act of 1840, the administrator was required to obtain an order for sale, clear and specific in terms; and such order should be strictly pursued to pass title to the purchaser. *Graham* v. *Hawkins*, 628.

ESTATES OF DECEDENTS—*Continued.*

28. An order of the probate court under the act of 1840 for the sale of "so much land lying in Robertson county, and west of the Trinity river, as would pay the debts of the estate, amounting to about $1500;" *held*, void for uncertainty. *Id.*

29. See this case for irregularities in a probate sale noticed in a collateral proceeding. *Id.*

ESTOPPEL.

INSURANCE, 3.

LAND, 2.

1. Legal estoppels exclude evidence of the truth and equity of the particular case, to support a strict rule of law on grounds of public policy. *Johnson* v. *Byler*, 606.

2. Equitable estoppels are admitted on the ground of promoting the equity and justice of the particular case, by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. *Id.*

3. Equitable estoppels are entitled to a fair and liberal application, like other equitable doctrines, which are admitted to suppress fraud and promote honesty and fair dealing. *Id.*

4. A party is estopped whenever he has gained an undue advantage, and has caused his adversary a loss or injury. *Id.*

5. One who has caused the making of an illegal contract by others cannot have the same set aside to benefit himself, to the injury of the contracting parties. *Id.*

6. Where a party has, by his representations or conduct, induced the other party in a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he cannot be permitted to avail himself of that advantage. *P. M. Ins. Co.* v. *Lyons*, 253.

ESTRAYS.

1. An indictment under Article 2441, Paschal's Digest, charging defendant with taking up and using a certain sorrel *gelding*, etc., etc., "then and there an animal coming within the meaning of an estray," *held* good. *Owens* v. *The State*, 555.

2. Prosecutions for unlawfully using an estray must be commenced within one year after the commission of the offense. *Id.*

EVIDENCE.

BURDEN OF PROOF, 1.
CRIMINAL LAW.
ESTOPPEL.
HOMESTEAD, 1, 3.
IMPROVEMENTS, 1.
PRACTICE, 7.
PLEADINGS, 4, 11, 12.
PRINCIPAL AND SURETY, 1.
SHERIFF, 1.
TRESPASS TO TRY TITLE, 2, 5, 9.

EVIDENCE—*Continued.*

1. Parol evidence is admissible to prove irregularities in a sheriff's sale. *Grace* v. *Garnett*, 156.

2. Proof that the parents emigrated to Texas and lived together as man and wife, is sufficient to establish the heirship of the children of the parties until the contrary is proven. *Kaise* v. *Lawson*, 160.

3. In an issue of insanity, the non-professional witness should not be allowed to give his opinion as to sanity or insanity, but should be confined to the acts of the subject, leaving the jury to form their opinion as to their cause. *Hickman* v. *The State*, 190.

4. The possession of a non-negotiable note without a written assignment is not evidence of ownership; the holder must show that he is the *bona fide* owner, and the manner in which he became such. *Ball's Heirs* v. *Hill*, 287.

5. It is error to instruct the jury that dealings between father and son are badges of fraud. *Shearon* v. *Henderson*, 245.

6. Where suit was for services as agent under contract, for the years 1860 and 1861, which fixed the compensation at the same amount as in a contract between the same parties for the year 1859, it was error to refuse to permit the contract of 1859 to go to the jury. *McCormick & Bro.* v. *Brush*, 314.

7. In a suit by a sub-agent it is error to exclude from the jury the contract between the principal and the agent. *Id.*

8. It is not error to exclude a judgment relating to land offered in evidence and not recorded in the county where the land is situated. *Fredrick* v. *Hamilton*, 321.

9. It is not error to reject evidence offered to sustain a title which, from such evidence offered, is a nullity. *Id.*

10. It is incompetent to prove the declarations of an agent in a suit against the principal, except such declarations be part of the transaction in controversy. *Wheelock & Co.* v. *Wright*, 496.

11. The improper admission of immaterial testimony is no cause of reversal. *Id.*

12. Under the statute allowing parties to testify, it is not error to allow such testimony to be given by depositions. *Id.*

13. Parties and interested witnesses may testify, under act of May 19, 1871, by deposition. *McMillan* v. *Warner*, 410.

14. In a trial where a deed is attacked for duress pleaded by the grantor, it is error to admit the declarations of the grantor in support of his plea. *Hardin* v. *Hardin*, 616.

15. In such trial it was error to exclude testimony showing a consideration for such deed. Such evidence should be allowed in connection with the testimony showing duress, to explain the motive for the execution of such deed. *Id.*

16. On a trial for murder the declarations of the defendant, made at the time of the killing, to the deceased, charging him with having insulted the wife of defendant, are not admissible in evidence for the de-

EVIDENCE—*Continued.*

fendant on cross-examination as part of the *res gestæ*, in the absence of testimony *aliunde* that such insult had been given. *Basham* v. *The State*, 622.

17. When a party, on cross-examination of a witness, seeks to draw out new matter not inquired about in the examination-in-chief, he makes the witness his own for that purpose, and the opposite party may cross-examine on such new matter. *Id.*

18. In prosecutions for theft the ownership of the stolen property must be satisfactorily proven as alleged. *Ritcher* v. *The State*, 643.

19. See this case for testimony *held* insufficient to sustain the allegation of ownership. *Id.*

20. Against a defendant in possession holding under a warranty deed from a vendor who also claimed under a deed with warranty, it is error to charge the jury that the recitals in a quit-claim deed (of a remote vendor) were evidence of a prior unregistered conveyance (not recited in the same), as if such prior conveyance had been duly recorded. *Graham* v. *Hawkins*, 628.

EXECUTION.

ESTATES OF DECEDENTS, 2, 3, 4.

EXEMPTION.

The law exempting certain property from forced sale was intended to secure to each family a means of support; and since in the exemption of two horses it was intended to protect to a family animals to use, it cannot be construed to exclude geldings, mares or mules, all being used for the same purpose. *Allison* v. *Brookshire*, 199.

FORCED SALE.

HOMESTEAD, 10, 17.

FRAUD AND FRAUDULENT CONVEYANCES.

ESTATES OF DECEDENTS, 8, 9. PLEADINGS, 1.
EVIDENCE, 5. VENDOR AND VENDEE, 1.
LANDLORD AND TENANT, 3.

1. An attempt by a clerk of a consignee to sell property consigned to his principal, to a party, for use of said party and the clerk making the sale, is fraudulent, and such contract would be void as against the consignors. *McMahan* v. *Alexander*, 135

2. Even if the clerk had authority to sell, he could not sell to himself, either directly, or indirectly to another for his use. *Id.*

GUARDIAN AND WARD.

ESTATES OF DECEDENTS, 22, 23.
PLEADINGS, 10.

1. The statutes of Texas give to the surviving parent the guardianship of the children of the marriage. *McKinney* v. *Noble*, 195.

GUARDIAN AND WARD—*Continued.*

2. The mother, although divorced and having the custody of the children decreed her, cannot by will deprive the father of the guardianship of their persons upon her death. *Id.*

3. She can dispose of her property, and if she bequeath it to her children, she may, for their use, appoint a trustee to manage it against the rights of the father. *Id.*

HOMESTEAD.

ESTATES OF DECEDENTS, 18, 19, 20, 21.

JURISDICTION, 6.

1. Where there is an abandonment of the homestead, with a fixed intention not to return, the property may be subjected to the demand of creditors; and it is error to instruct the jury that proof of acquisition of a new homestead is alone conclusive evidence of the abandonment of the old. *McMillan* v. *Warner*, 410.

2. The question of abandonment is almost exclusively a question of intent, and that intent must be clearly established by the best accessible evidence, before a jury will be authorized in finding a relinquishment of any rights under the homestead laws; that a party has been absent for an indefinite period, is not sufficient to establish the fact of abandonment, unless accompanied with proof of intent not to return. *Id.*

3. The declarations of a party before, at the time of, and after leaving his home, may be given in evidence to establish the intent; but the sworn statement of the party himself, taken in a court of justice, if credible, must settle the question, for he alone has full knowledge of that intent. *Id.*

4. The act of May 19, 1871, repeals the common law rule heretofore in force in this State, as to the disqualification of witnesses on account of interest, and, with one exception, removed all legal objections to their admissibility on account of interest in the issue tried. *Id.*

5. At the death of the wife, the title to one-half of the homestead passes to and vests in the children of the marriage; and that half passes beyond the husband's power of alienation. *Clark* v. *Nolan & Campbell*, 416.

6. In changing a rural homestead into a town homestead, the lots made in dividing up the land, not used as a homestead, but merely kept for purpose of sale or speculation, become by such change community property; and at the death of the wife an undivided one-half interest passes to and becomes vested in the issue of the marriage, to the exclusion of all power or authority in the surviving husband over it. *Id.*

7. N. owned a 120-acre tract of land adjoining the town of Navasota, occupied by him as a rural homestead, eighty acres of which he donated to the railroad. The corporation of Navasota extending its boundaries over the homestead of N., he subdivided his land into lots, selling off all but four blocks, which he still retained as a homestead. *Held*, that ex-

HOMESTEAD—*Continued.*

tending the boundaries of the corporation did not change the homestead from a rural to a town homestead; nor did the erection of houses for rent on the land retained subject it to forced sale. *Nolan* v. *Reed*, 425.

8. A deed of trust executed by husband and wife to secure a debt due from the husband, is such a conveyance of an interest in land as is contemplated by the act defining the mode of conveying property in which the wife has an interest. *Jordan* v. *Peak*, 429.

9. The husband and wife may, by deed of trust duly executed and acknowledged in the manner prescribed by law, legally encumber the homestead to secure the payment of a debt. *Id.*

10. A sale by the trustee under such a deed of trust is not a *forced sale* in contemplation of law. *Id.*

11. A city homestead of the maximum value cannot be increased by purchasing additional adjacent lots. *Richards* v. *Nelms*, 445.

12. Nor did the act of February 2, 1860, alter this rule. *Id.*

13. The increase in value protected by said act is that occasioned by the appreciation in value of the land, and by improvements made thereon. *Id.*

14. In computing the value of a city homestead where it is sought to extend its limits, the improvements must be included in the valuation. *Id.*

15. Where a homestead has been dedicated under a former law, but has increased in value not to exceed the amount now reserved from forced sale, under the Constitution of 1869, it will still be protected as a homestead. *Baylor and Dawson* v. *San Antonio National Bank*, 448.

16. Where a party advances money to relieve a homestead from the lien for unpaid purchase money, and takes from the purchaser and his wife notes for the amount advanced, and a deed of trust to secure their payment, he is not thereby subrogated to rights of the vendor, and the homestead is relieved from the lien for purchase money. *Malone* v. *Kaufman*, 454.

17. In such a case the notes and the deed of trust, being for money loaned, the contract is not such an one as can subject the homestead to forced sale, whatever may have been the intention of the parties to the contract at the time. *Id.*

18. The right of homestead does not attach until the property is paid for. *Joplin* v. *Fleming*, 526.

19. In the administration of an estate the probate court has jurisdiction to ascertain *what is* the homestead; yet the court has no jurisdiction to order the sale of the homestead, nor would a purchaser at such sale take any right as against the minor children. *Yarboro* v. *Brewster*, 397.

20. The action of the probate court setting aside a homestead is conclusive, except when directly attacked. *Cannon* v. *Bonner*, 487.

21. A judgment lien has priority over a purchaser of the homestead under a deed of trust signed and duly acknowledged by the husband and wife for the same property. *Taul* v. *Epperson*, 492.

HUSBAND AND WIFE.
CONTRACT, 7.

IMPROVEMENTS.
A claim for improvements made in good faith will not be sustained by proof of mistake as to the boundary lines of the land claimed, unless carelessness be excluded. *Nesbitt* v. *Walters*, 576.

INDICTMENT.
CRIMINAL PROCEDURE, 3, 6.
1. In an indictment for obstructing a public road, it is not necessary to allege the materiality of the obstruction, or that the road had been laid off by the proper authorities as a public highway, nor to negative the right of the defendant to place the obstructions in the road. *The State* v. *Collins*, 189.
2. These are matters of defense or mitigation, and may be shown by the defendant. *Id.*
3. Defendant was indicted for an assault upon one Persons; *held*, the omission to add the final letter to the name of Persons not such a change in the name as would vitiate the indictment. *Hart* v. *The State*, 382.
4. An indictment under Article 2441, Paschal's Digest, charging defendant with taking up and using a certain sorrel *gelding*, etc., etc., "then and there an animal coming within the meaning of an estray," *held* good. *Owens* v. *The State*, 555.
5. It is not essential that the indictment should charge the offense in the precise language of the statute. *Fowler* v. *The State*, 559.
6. Indictment charging defendant with driving stock out of *the* instead of *its* accustomed range, *held* sufficient. *Id.*

INFORMATION.
1. An information filed by the district attorney must conclude "against the peace and dignity of the State." *Wilson* v. *The State*, 548.
2. Upon an information against an officer for malfeasance in office, a trial without a jury is a nullity. *Id.*
3. See this case for an information held insufficient in law to warrant a verdict or judgment against the defendant. *Id.*

INJUNCTION.
1. While a complete denial under oath of all the equities in a bill for injunction does not entitle the party to a dissolution of the injunction as a matter of law, yet it places the whole matter within the sound discretion of the court to dissolve the injunction or not, as the equities of the case may require; and the exercise of that discretion will not be revised by the Supreme Court, unless it be manifest that error has been committed. *Hart* v. *Mills*, 517.
2. Pending a bill of review, injunction should not be resorted to by the plaintiff in the bill of review as an independent proceeding to stay execution in the original suit. *Id.*

INJUNCTION—*Continued.*

3. A judgment upon a contract on its face payable in Confederate bills may be enjoined even after twelve months from the date of the judgment. *Thompson* v. *Bohannon*, 248.

INNOCENT PURCHASER.

TRESPASS TO TRY TITLE, 4, 5.

1. The consideration, which must be alleged and proven, to support the plea of innocent purchaser, must be valuable and legal. *Willis* v. *Johnson*, 303.

2. The defense of innocent purchaser for valuable consideration cannot be sustained when the consideration paid was Confederate notes or bills. *Id.*

3. A *bona fide* purchaser from an heir takes the estate as against the holder of an unrecorded deed from the ancestor. *Vaughan* v. *Greer*, 530.

4. The fraudulent intent of the vendor in no way affects the title of the *bona fide* purchaser, and it is error to instruct the jury that the validity of a sale is dependent upon the intent of the vendor. *Shearon* v. *Henderson*, 245.

5. *Rogers* v. *Burchard* (34 Texas, 441) limited. *Graham* v. *Hawkins* 628.

INSANITY.

EVIDENCE, 3.

INSURANCE.

1. A policy of insurance contained, among other stipulations, the following, viz.: "If the assured shall have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, without the consent of the company written hereon, * * then, and in every such case, this policy shall be void." The agent of the company was informed by the assured that additional insurance had been obtained. *Held*, that it was the duty of the company, upon being notified of the additional insurance, to have endorsed the same upon the plaintiff's policy, or notified the insured of the refusal of the risk, and that, having failed to do so, it is estopped from setting up as a defense that such additional insurance was not endorsed on the policy. *P. M. Ins. Co.* v. *Lyons, Lindenthal & Co.*, 253.

2. An agent of an insurance company authorized to make and revoke contracts of insurance, is the proper person to give consent to the procuring of new insurance, unless his powers be restricted by the company in this respect, and the insured have notice of the restriction. *Id.*

3. Where a party has, by his representations or conduct, induced the other party in a transaction to give him an advantage, which it would be against equity and good conscience for him to assert, he cannot be permitted to avail himself of that advantage. *Id.*

INSURANCE—*Continued*

4. Insurance companies doing business through agencies at a distance from their principal places of business, are responsible for the acts of their agents within the general scope of the business with which they are entrusted, and no limitation on the authority of the agent will be binding on the parties with whom he deals, unless such limitation be brought to their knowledge. *Id.*

JUDGMENT.

CONFEDERATE MONEY, 4. PRACTICE, 1.
CONTEMPT, 3, 4. TRESPASS TO TRY TITLE, 1.
ESTATES OF DECEDENTS, 17. VERDICT, 2.
PARTIES, 2

1. In a suit involving title to personal property, the intervenor who is found to be the owner is, as against the plaintiff who had attached the property, and another intervenor who has it in possession, entitled to judgment for possession of the property, and to a judgment against the plaintiff in the alternative for its value under a prayer for general relief. *Burlacher* v. *Watson*, 62.

2. Defendant was tried before a justice of the peace, and convicted of a violation of the law regulating the carrying of fire-arms. The judgment of the court was that he "deliver to this court the pistol which he was in this case convicted of carrying, and that the sheriff hold said defendant in custody until this judgment is complied with." *Held*, such judgment was without authority of law and void. *Hudeburgh* v. *The State*, 535.

JURISDICTION.

APPEAL, 2, 3, 5, 6. ESTATES OF DECEDENTS, 16, 19.
BANKRUPTCY, 1. PARTIES, 4, 5.
DISTRICT COURT, 1, 2, 3.

1. Where both parties to a suit involving the office of State Treasurer are before the Supreme Court on a return to *scire facias* sued out by one of the parties against the other, on a charge of contempt, this court has power to make such order as may be necessary to place the Treasurer *pro tempore* in full possession of the office. *Honey* v. *Davis*, 63.

2. Where the principal debtor, against whom several judgments were rendered by a magistrate, was dead and his estate insolvent, the magistrate dead and his records lost, and the amounts of the judgments aggregated over one hundred dollars—*held*, that the surety on the bonds to stay execution might be sued in the District Court for the amount of the judgments. *Ende* v. *Spencer*, 114.

3. At the close of the term the District Court loses all jurisdiction over its final judgments, and has no power to vacate the same save by original bill for that purpose. *Bass* v. *Hays*, 128.

4. The plaintiff suggested the death of a non-resident defendant and obtained an order for *scire facias* to his representative. The clerk after-

JURISDICTION—*Continued.*

wards issued citation to the defendant for publication, which was returned by the sheriff as "received on the eighteenth of September, 1871, and executed on the twentieth of September, 1871, by causing its publication," etc. At a subsequent term the suggestion of death was corrected on ascertaining the defendant was still living. *Held*, that the court had acquired no jurisdiction over the defendant. *M. M. Ins. Co.* v. *Brower & Co.*, 230.

5. This court rendered judgment March 7, 1855, in an action of trespass to try title, after the death of the original appellee, who was plaintiff below, and the executrix of whose will was made appellee in his stead, but without making the heirs parties. *Held*, that this court had jurisdiction. *Egery* v. *Power*, 378.

6. In the administration of an estate the probate court has jurisdiction to ascertain *what is* the homestead; yet the court has no jurisdiction to order the sale of the homestead, nor would a purchaser at such sale take any right as against the minor children. *Yarboro* v. *Brewster*, 397.

7. The amount of the judgment prayed for is taken as a test of jurisdiction in a suit brought in the county court in 1868. *Alexander* v. *Thompson*, 533.

8. An order transferring a criminal case to another county does not transfer the jurisdiction, unless the defendant be recognized to appear before the court to which the venue is sought to be changed. *The State* v. *Butler*, 560.

JURY.

CRIMINAL PROCEDURE, 8, 9, 10, 11.
PRACTICE, 15.

LACHES.

LAND, 8.

LAND.

ESTATES OF DECEDENTS, 5.
INNOCENT PURCHASER, 1, 2.
IMPROVEMENTS, 1.
LIMITATION, 3, 4, 5.
NOTICE, 2, 3.
PRACTICE, 20.
POSSESSION, 1.
PROMISSORY NOTES, 4.
SUBROGATION, 1.
TRESPASS TO TRY TITLE.
VENDOR AND VENDEE, 1.

1. After a recognition by the government of a grant to the extent of its boundaries for over thirty years, no cancellation of the same can be obtained on account of an excess of land covered by the grant. *State* v. *Galveston City Co.*, 12.

2. When a patent to land has been issued by the President of the Republic and Commissioner of the General Land Office, and was recognized by subsequent legislation of the Congress of the Republic, the State of

LAND—*Continued.*

Texas is estopped from denying the right of those claiming under it to the full extent of the boundaries set out in the patent. *Id.*

3. When a citizen or subject of a foreign government emigrates to this State, and, after residing here long enough, makes the usual declaration before the clerk of a court of record, of his *bona fide* intention to become a citizen of the United States, but dies before he has remained long enough to receive his certificate of citizenship, his children, born abroad, who came to Texas with the father before attaining the age of seventeen years, take estate of inheritance in the lands owned by the father, and, on attaining the age of twenty-one years, become citizens of the United States and of the State of Texas. *Schrimpf* v. *Settegast*, 96.

4. Possession and improvements by the vendee under a parol contract for the sale of land entitles the vendee to a specific performance on payment of the purchase money. *Id.*

5. Where time is not of the essence of the contract for sale of land, the mere failure to pay the purchase money will not be held a repudiation of the contract, so as to authorize suit by the vendor for the recovery of the land. *Gregg* v. *English*, 139.

6. The vendor in an executory contract for sale of land should tender a deed and make demand of the purchase money before suing for the land against his vendee. *Id.*

7. The withdrawal from the district surveyor's office, in 1839, of a located certificate and of all written evidence of the location thereof, and failing to return the same for ten years, are facts from which an abandonment of the location may be presumed. *Frederick* v. *Hamilton*, 321.

8. The prosecution of an unsuccessful suit for *mandamus* against a surveyor to compel him to make a survey upon an irregular file or location does not excuse a failure to perfect such file or location into a survey under the act of tenth of February, 1852, "concerning surveys of land." *Id.*

9. Article 10, Section 2, of the Constitution of 1869, declaring, "That all surveys of land heretofore made, and not returned to the General Land Office in accordance with the provisions of 'An act concerning surveys of land, approved the tenth of February, 1852,' are hereby declared null and void," applies to locations and surveys made prior to the adoption of the Constitution, and presents a rule of decision for courts in passing upon such locations. *Id.*

10. A *bona fide* purchaser from an heir takes the estate as against the holder of an unrecorded deed from the ancestor. *Vaughan* v. *Greer*, 580.

11. Where land was held under continued possession and cultivation, by virtue of location and survey, for thirty years prior to entry by an adverse claimant,—*held*, that the right of entry to those laboring under no disability was tolled long before, and, under our law, the right of entry is not only tolled, but a right of action accrues to one who has been ousted of such possession. *Turner* v. *Rogers*, 582.

LAND—*Continued.*

12. A joint resolution by the Congress of the Republic directing the Commissioner of the General Land Office to issue patent upon a survey may be regarded a legislative grant to the owner of such survey. *Id.*

13. He who is in possession of land with improvements and enclosures holds actual possession of that portion within his enclosures; but if, at the same time, he holds under a deed, the deed gives him constructive possession of all the land embraced in the deed. *Chandler* v. *Rushing*, 591.

14. When one ceases to have actual possession of land, by sale of the improved portion, or otherwise, he loses his constructive possession of the remainder. *Id.*

15. The act of the Legislature of the tenth of February, 1852 (Paschal's Digest, 4461), in which the State relinquishes "all her right and interest in the following described lands to the original grantees thereof, their heirs, and legal assignees," conveyed no title other than a confirmation of the original titles. *Martin* v. *Wayman*, 649.

LANDLORD AND TENANT.

1. A tenant in undisturbed possession cannot set up title in himself as against the title of his landlord under which he entered. *Lyles* v. *Murphy*, 75.

2. A tenant in possession who purchases a superior outstanding title before eviction or surrender of his lease, cannot resist the payment of rent to the landlord for the term. *Id.*

3. Though a tenant will not, in general, be permitted to question the title of the landlord under whom he went into possession, yet if there be fraud on the part of the landlord in the execution of the lease, and he is unable by reason of insolvency to indemnify the tenant for rents wrongfully exacted, the tenant may, while in possession, purchase a superior title, if he does so in good faith, from a well grounded fear of eviction, and may rely on the title thus acquired in resisting a suit by the landlord for possession. *Gallagher* v. *Bennett's Heirs*, 291.

LIEN.

A judgment lien has priority over a purchaser of the homestead under a deed of trust signed and duly acknowledged by the husband and wife, for the same property. *Taul* v. *Epperson*, 492.

LIMITATION.

ESTATES OF DECEDENTS, 9.

LAND, 11.

TRESPASS TO TRY TITLE, 6, 7, 8.

1. Uninterrupted peaceable possession for ten years of land gives the possessor title to 640 acres without any other evidence of title. *Melton* v. *Turner*, 81.

2. Prosecutions for unlawfully using an estray must be commenced

LIMITATION—*Continued.*

within one year after the commission of the offense. *Owens* v. *The State*, 555.

3. For possession of land to be made available under the plea of limitation, it must be an unbroken possession for the full period. *Chandler* v. *Rushing*, 591.

4. If possession of land be broken before the period necessary to give limitation to a defendant is complete, it requires no privity in blood or estate between the plaintiff and the one who ousted the possession of defendant, to give the former the advantage of the ouster. *Id.*

5. In a suit to quiet title, where the plaintiff relies for title on ten years possession, it must appear that such possession was continuous; and should the plaintiff undertake to tack to his possession that of his tenant, it must clearly appear that he continued to exercise acts of ownership over the premises during the time which elapsed between the possession of plaintiff and that of his tenant. *Bank of Virginia* v. *Hedges*, 614.

LIS PENDENS.

NOTICE, 2.

Lis pendens is notice of the matters in litigation, but only such as appear in the pleadings. *Shearon* v. *Henderson*, 245.

MARITAL RELATIONS.

CONTRACT, 7.

1. The wife is liable to pay the value of materials used in the improvements beneficial to her separate property, the title to which is in a trustee, when, by the wife's consent, the trustee permits the husband, as his agent, to manage the property and contract debts in the trustee's name. *Perkins* v. *Baker*, 45.

2. While equity protects the estates of married women from illegal and fraudulent encroachments, it will not, at the same time, suffer the holders of such estates to deny the payment of a just debt created solely for their benefit, and from which they derive substantial advantage. *Id.*

3. The 27th Section of Article 12 of the Constitution of 1869 confers on those negroes who had lived together while in slavery, upon the terms and under the conditions described in that section, marital rights and legitimates their offspring. *Hill* v. *Fairfax*, 220.

MEASURE OF DAMAGES.

CONTRACT, 3.

MORTGAGE.

VENDOR'S LIEN, 3.

MOTIONS.

NEW TRIAL, 2.

PRACTICE, 4, 5, 6.

MURDER.
CRIMINAL LAW, 4, 5, 6.
EVIDENCE, 15.

NATURALIZATION.
LAND, 3.

NEW TRIAL.
MOTIONS.
1. No new trial will be granted on account of newly discovered evidence which is only cumulative in its character. *Kemp* v. *The State*, 110.
2. A motion for new trial not acted on is discharged by the adjournment of the court. *Bass* v. *Hays*, 128.
3. While the court is reluctant to depart from the rule upholding verdicts supported by any reasonable evidence, the gross injustice which too often invades life, liberty and property, in the form of verdicts, cannot be overlooked. *Turner* v. *The State*, 166.
4. See this case for evidence held insufficient to support conviction. *Id.*
5. The defendant was convicted of murder in the second degree; his attorneys, appointed by the court, filed a motion for new trial. On the next day all of his attorneys were arrested by order of the court for an alleged contempt; on a subsequent day the attorneys were brought into court by the sheriff, and required by the court to *argue the motion*. *Held*, to be such a wanton trifling with the rights of the defendant as to require a new trial, irrespective of the merits of the case. *Robertson* v. *The State*, 187.
6. It is error to refuse new trial where judgment has gone against defendants as partners, on notes for borrowed money executed by them individually, where it does not appear conclusively that the money was applied to the business of the partnership. *Walsh & Gilbert* v. *Moser*, 290.
7. It is proper for the court, in considering a motion for new trial based on alleged error in overruling an application for continuance, to consider the facts established on the trial, both with a view of determining the materiality of the facts which it was stated the absent witness would prove, and the truth of the affidavit. *Holland* v. *The State*, 474.
8. A defendant against whom a judgment by default was taken, disclosed in his motion to set aside the judgment and for a new trial, a good defense, and that his failure to appear in obedience to the process of court was on account of his compulsory attendance on the Federal Court elsewhere. *Held*, error to overrule the motion. *Tullis* v. *Scott*, 537.

NON-INTERCOURSE ACT.
Until the passage of the non-intercourse acts by Congress in July, 1861, and the proclamation under said acts on sixteenth of August, 1861, commercial intercourse between citizens of Illinois and of Texas was not illegal. *McCormick & Bro.* v. *Arnspiger*, 569.

NOTICE.

POSSESSION, 1.

1. The record of a deed in a county where the land was situate at the time of recording, though upon subdivision of the county subsequent to the record of the deed the land may fall within the territory taken off, is notice to purchasers. *Melton* v. *Turner*, 81.

2. A *mandamus* suit against the Commissioner of the Land Office is not notice of the claim of the plaintiff, unless the land be so described in the pleadings that it may be known what land is the subject of controversy. *Frederick* v. *Hamilton*, 321.

3. Any deed duly recorded is notice to the world of whatever it contains, and no one can claim adversely to such deed as an innocent purchaser. *Vaughan* v. *Greer*, 530.

NOVATION.

ESTATES OF DECEDENTS, 15.

1. An agreement made by an attorney of B. (an executrix) with C., by which the attorney surrendered to C. a note due the estate, given by D., secured by deed of trust on land, in consideration of C.'s note then given to pay the amount mentioned in the note surrendered "twenty-four months after the ratification of a treaty of peace between the United States and the Confederate States, payable in whatever may then be the legal currency of the Confederate States," also secured by deed of trust on the same land, does not discharge the first note, which still remains a valid incumbrance on the land. *Scott, Admx.*, v. *Atchison*, 384.

2. Only those to whom a valid payment may be made can make a novation of a debt. *Id.*

OFFICER AND OFFICES.

1. Pending an appeal involving the right to the office of State Treasurer, where neither party is in full possession of the office, safes and public money, that party in whose favor the judgment of the District Court has been pronounced must be regarded as *pro tempore* the Treasurer of the State. *Honey* v. *Davis*, 68.

2. When both parties are before the Supreme Court on return to *scire facias* sued out by one of the parties against the other, on a charge of contempt, this court has power to make such order as may be necessary to place the Treasurer *pro tempore* in full possession of the office. *Id.*

PARTIES.

ESTATES OF DECEDENTS, 1, 23. PLEADING, 9, 14, 15.
JURISDICTION, 5. PRACTICE, 11, 12.

1. As at common law, so by the statutes of Texas, the lands of an intestate vest upon his death in his heirs, and they cannot be divested of title unless made parties. *Loller* v. *Frost*, 208.

2. It was, therefore, error in a suit by an administrator to enforce the vendor's lien, and which had been changed by the defendants in posses-

PARTIES—*Continued.*

sion into an action to quiet title, to adjudicate title to the said defendant against the administrator without making the heirs parties. *Id.*

3. Though a plaintiff may become appellee in this court, he is here a defendant only as to the alleged errors of the lower court; and if he dies pending an appeal, his heirs are not necessary parties, but the case may proceed to judgment on making his executor a party. *Egery* v. *Power*, 373.

4. *Quære:* Whether, on motion of parties representing themselves to be the heirs of one who died pending an appeal to this court, and who here ask to set aside a judgment of this court because they were not made parties, this court has jurisdiction to inquire *dehors* the record, and determine the question of heirship? *Id.*

5. Under Section 6 of act of May 23, 1871, an administrator against whom a motion has been made to compel a new bond has, notwithstanding the service of notice of such motion, the right to prosecute suit to final judgment, unless he had been finally removed from the administration. *Hitson* v. *Dillahunty*, 585.

6. Such administrator would not have authority to institute suit after such service of notice, but would have the right to prosecute suit or do any other act having for its direct object the saving the estate from loss or damage. *Id.*

PARTNERSHIP.

ESTATES OF DECEDENTS, 12.

NEW TRIAL, 6.

1. Where a person acting in the capacity of agent or partner, with full authority from his principal or copartners, in the purchase of property, gives a note or other obligation for the purchase money in his own name, and the property is received for the benefit of all, all will be equally bound as makers of the obligation. *Sessums* v. *Henry*, 37.

2. A partner has no separate and exclusive right to any portion of the partnership assets, and the creditor cannot execute and sell the interest of one partner as a separate interest while the undivided interest may be reached in equity. *Warren* v. *Wallis, Landes & Co.*, 225.

3. The ownership of one partner in the property of the firm is subject to the like ownership of all the partners who hold subject to each other's ownership. *Id.*

4. An attachment will not lie against the common property of a copartnership for the separate debt of one of the partners so long as the partner is indebted to his firm, or the firm indebted to third persons. *Id.*

5. In a suit by a creditor of one partner to subject the partnership assets to the payment of his claim, the *onus probandi* is upon the plaintiff to show that the defendant has an interest in the assets over and above his debts to the firm, and the debts of the firm to third persons. *Id.*

6. The fact that a partnership sold wares by the mmanufactured to the

PARTNERSHIP—*Continued.*

Confederate States authorities will not defeat an action by one of the firm for an account of the gains of such partnership. *Pfeiffer* v. *Maltby*, 523.

PAYMENT.

CONTRACT, 9, 15.

CONFEDERATE MONEY, 6.

1. The maker of a promissory note may pay the same in any way he and the holder may agree upon, provided the maker has no notice that the bearer had the note for collection only. *Browning* v. *Sledge & Browning*, 192.

2. Payment in other notes instead of money made by the maker to the bearer, who had an interest in the note—*held*, good against the owner unless knowledge be brought to the maker of the agency of the holder. *Id.*

3. Payment to a Confederate States Receiver cannot be pleaded in satisfaction in a suit brought by the owner. *McCormick* v. *Arnspiger*, 569.

PLEADINGS.

ABATEMENT, 1.

CONTEMPT, 2.

PRINCIPAL AND AGENT.

1. The intent to mislead and defraud, and that the party was misled and defrauded, are necessary allegations in a petition to constitute a sufficient charge of fraud. *State* v. *Galveston City Co.*, 12.

2. Suit for possession of realty may be joined with a claim for rent of the property. *Lyles* v. *Murphy*, 75.

3. In determining whether the pleading forms a sufficient basis for recovery, the original plea may be considered in connection with subsequent amendments; when neither, taken separately, is good, a demurrer will not be sustained, if considered together they state a cause of action. *Munnerlyn* v. *Alexander*, 125.

4. In a suit upon a contract to deliver a given quantity of lumber, it is necessary to allege and prove the value of the property not delivered. *Stroop* v. *McKenzie*, 132.

5. A writ of *scire facias* upon a forfeited bail bond should show when, where and by what authority the bail bond was taken. *Cushman* v. *The State*, 181.

6. The *scire facias* should correctly describe the bail bond, and a defect in a material matter will be fatal on appeal from the judgment final. *Id.*

7. A bail bond binding the defendant to appear in Refugio county and forfeited in the District Court of Aransas county, the judgment *nisi* and *scire facias* describing the bond as obligating defendant to appear and answer in Aransas county—*held*, such misdescription is fatal. *Id.*

PLEADINGS—*Continued.*

8. Where part of a county is detached and the cases sent to the new county, and bail bond in such transferred cases forfeited, the *scire facias* should state the facts necessary to show the connection between the bond and judgment *nisi*. *Id.*

9. It is error to join in the same action a note payable to the plaintiff in his individual capacity and one payable to him in a fiduciary capacity. *Thompson* v. *Bohannon*, 241.

10. Guardian for minor heirs may sue on a promissory note payable to the ancestor of his wards on showing that they are the only heirs of the payee and no administration on his estate. *Roberts* v. *Sacra*, 580.

11. Defendant having pleaded in reconvention and asked affirmative action of the court against the wards of the plaintiff, will not be heard to deny the representative character of the plaintiff. *Id.*

12. And in such pleadings the production of the note is sufficient evidence to entitle plaintiff to recover, and a demurrer to the evidence in such case should be overruled. *Id.*

13. In a suit upon an account, a petition failing to contain a bill of particulars does not set out the plaintiff's cause of action in a clear and intelligible manner, and is defective. *Boynton* v. *Chamberlain*, 604.

14. In a suit by publication against non-resident defendants, the omission to give the Christian name of one of the defendants *held* to be error. *Id.*

15. A petition sufficiently sets out the name of the plaintiff when it follows the note on which the suit is brought. *Brown* v. *Hunter*, 626.

16. A demurrer to evidence is analogous to a demurrer in pleading, the party from whom it comes declaring that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue. *Stephens* v. *Hix*, 656.

POSSESSION.

Possession of land by one person is not of itself evidence of the right or claim of another in the land; and in the absence of notice to the junior locator that the occupants held under the elder claim, such possession does not affect the right of the junior claimant. *Frederick* v. *Hamilton*, 321.

PRACTICE.

BAIL BOND, 3.
CONTEMPT, 1.
CONTINUANCE, 1, 2.
CONSTITUTIONAL LAW, 2.
CRIMINAL PROCEDURE, 5, 6, 7.
INJUNCTION, 1, 2.
JURISDICTION, 3.
NEW TRIAL, 5, 7, 8.
PARTNERSHIP, 1.
PLEADING, 16.
PROMISSORY NOTES, 1, 2, 3, 5, 6.
SERVICE OF CITATION, 1.
TRIAL BY JURY, 5.
TRESPASS TO TRY TITLE, 1.

1. It is error to take judgment against a remote endorser after dismissing as to the maker of a note. Such error should be corrected by ap-

PRACTICE—*Continued.*

peal or writ of error, not by injunction or bill for new trial. *Groesbeck* v. *Campbell*, 36.

2. Where an appeal bond fails to show for what the judgment was rendered in the court below, the appeal will be dismissed for want of jurisdiction. *Burch* v. *Corporation of Bastrop*, 80.

3. It is error to submit to the jury the question, whether a receipt purporting on its face to be a final settlement, be final, in the absence of testimony of fraud or mistake, or that the receipt was only conditional. *Adriance* v. *Crews*, 148.

4. It is the duty of the district clerk, upon filing a motion, to enter the same at once upon the motion docket; but a failure to so enter a motion for new trial, *filed* within two days after the trial, should not be allowed to work an injury to the party filing the same. *Hammock* v. *May*, 196.

5. A motion handed to the clerk, and by him endorsed filed, with his official signature, is properly filed, although the clerk, at the time, was not in his office. *Id.*

6. See as to practice in filing and docketing motions. *Id.*

7. Where the answers of a witness are not full in response to a cross-interrogatory, which seeks to explore the source of his knowledge about the fact testified to, his testimony, if admitted at all, should be with great caution to the jury. *Ball's Heirs* v. *Hill*, 237.

8. If a defendant die before service of citation upon him, it is necessary that his administrator be served with citation and copy of the petition. It is error to render judgment upon service of *scire facias* only in such case. *Lyendecker* v. *Martin*, 287.

9. It is error to strike out an answer which, though it may be untrue in fact, presents a complete bar to the plaintiff's action. *McCormick & Bro.* v. *Brush*, 314.

10. It is not error in the court below to direct the jury to amend their verdict as to a clerical omission, or to express clearly their intention. *Frederick* v. *Hamilton*, 321.

11. It is error to take judgment against the wife after dismissing as to the husband. *Taylor* v. *Bonnett*, 521.

12. It is error to join the wife with the husband in a suit on a promissory note executed by the husband and wife jointly, without showing it was given for the benefit of the wife's separate property. *Id.*

13. It is error to dismiss a case upon any reason not apparent upon the face of the petition. *Pfeiffer* v. *Maltby*, 523.

14. The report of an auditor of a fact which would, if true, defeat the action, cannot justify the court in dismissing the suit. *Id.*

15. Parties have a right to trial by jury, and when a jury is demanded it is error in the court to dismiss the case upon a fact ascertained by the court from report of an auditor. *Id.*

16. It is error to permit a plaintiff to amend his petition after default taken without first having the default set aside. *Tullis* v. *Scott*, 537.

17. Where the court is satisfied that a defendant who is taken sick

PRACTICE—*Continued.*

during his trial on a charge of felony is too unwell to be present in court at every stage of the trial, the cause should either be temporarily continued, to await his convalescence, or a juror withdrawn and the cause continued. *Brown* v. *The State*, 482.

18. Parties have a right to a reasonable time for the presentation of the facts to the jury, as well as to comment on those facts, and an arbitrary disregard of these rights by the District Court will, on appeal, be ground of reversal. *Nesbitt* v. *Walters*, 576.

19. Ten minutes time *held* an unreasonable limit in this case. *Id.*

20. It is the duty of the district judge to submit to the jury *the issues* made by the pleadings; and in this case *held*, that where the pleadings showed that the title to land was in controversy, as well as damages, it was error to fail to submit the question of title, and to limit the jury to the question of damages. *Id.*

21. It seems that in the statement of facts required, where judgment is rendered upon citation by publication, it should appear that depositions used in evidence were regularly taken. *Boynton* v. *Chamberlain*, 604.

22. In a suit upon notes executed for land and secured by the vendor's lien, and against the maker of the notes in possession of the land, if defects of title to the land, plead in defense, be removed by plaintiff or others before the trial, the plaintiff may recover. *Keep* v. *Simpson*, 206.

23. A District Court has authority to enter *nunc pro tunc* an order of a former term, omitted from the minutes by mistake of the clerk. *Miller* v. *Richardson*, 500.

24. There should be some memorandum in writing of such action among the papers of the cause, to authorize entry of such order or judgment of the former term. *Id.*

25. The entry of the judge upon the motion docket at a former term is such memorandum as would authorize the entry of the same upon the minutes of a subsequent term. *Id.*

26. Where there was evidence introduced showing defects in proceedings which were requisite to the authority of the administrator to sell lands, the court, after instructing the jury that the law presumed everything legally necessary to have been done by the probate court, should have given the further charge that such presumption was overcome by facts which prove the contrary. *Graham* v. *Hawkins*, 628.

PRACTICE IN SUPREME COURT.

APPEAL, 1. OFFICES, 2.
EVIDENCE, 11. WRIT OF ERROR, 1.
NEW TRIAL, 3.

1. An order of the District Court vacating a final judgment rendered in the same case at a former term will be set aside by the Supreme Court on appeal by the party injured. *Bass* v. *Hays*, 128.

PRACTICE IN SUPREME COURT—*Continued.*

2. A judgment will not be reversed, though the charge be erroneous, unless it appears that the verdict was affected by such erroneous charge. *Kaise* v. *Lawson*, 160.

3. The statute fixing the time for the prosecution of writs of error to the Supreme Court within two years of the rendition of judgment is not a law of limitation. *Hart* v. *Mills*, 513.

4. If the plaintiff demur to the evidence of the defendant, and the defendant join in the demurrer, the question of fact upon the evidence is cast upon the court; and, on appeal, the court will render such judgment as the testimony warrants. *Stephens* v. *Hix*, 656.

PRESUMPTIONS.

ESTATES OF DECEDENTS, 10, 11. LAND, 7.
EVIDENCE, 2. PRINCIPAL AND SURETY, 1.

1. In matters of contract the parties are presumed to have acted legally in making it until the contrary is shown. *Tucker* v. *Streetman*, 71.

2. The law presumes that the note expressed the intention of the parties, and the presumption will not be removed by proof of condition of the country in 1863, at its date, and the currency in general use. *Id.*

PRINCIPAL AND AGENT.

CONTRACT, 13, 14. INSURANCE, 1, 2, 4.
FRAUD AND FRAUDULENT CONVEYANCES, 1, 2. PARTNERSHIP, 1.

1. An agent or trustee cannot delegate the authority conferred upon him without an express power to that effect; and where any rights are claimed under the exercise of that authority, the power to make such delegation must be expressly alleged and proven. *McCormick & Bro.* v. *Brush*, 314.

2. When money is advanced to an agent in the regular discharge of his agency, and for the especial benefit of the principal, the principal may ordinarily be held responsible; but unless it be made clearly to appear that the loan or advance was made for the especial benefit of the principal, then the agent alone is responsible, in the absence of special authority from the principal. *Id.*

3. Insurance companies doing business through agencies at a distance from their principal places of business, are responsible for the acts of their agents within the general scope of the business with which they are entrusted, and no limitation on the authority of the agent will be binding on the parties with whom he deals, unless such limitation be brought to their knowledge. *Ins. Co.* v. *Lyons*, 253.

4. The sale of property in Texas in May, 1861, by an agent residing in Texas, whose principal was residing at the time in Illinois, was not illegal as between such agent and the purchaser; and the principal, after the close of the war, can maintain his action for the agreed purchase money against such purchaser. *McCormick* v. *Arnspiger*, 569.

PRINCIPAL AND SURETY.

All the parties signing an obligation are principals, unless it appear otherwise, or it be shown by the express understanding of all the parties to the contract that the relation of principal and surety existed between the makers of the instrument. *Stroop* v. *McKenzie*, 132.

PROBATE COURT.

ESTATES OF DECEDENTS.

PROMISSORY NOTES.

EVIDENCE, 4.

PAYMENT, 1.

PRESUMPTIONS, 2.

1. The words, "A. B., please pay the above bill," written and signed upon an itemized account, do not constitute a negotiable instrument. *Platzer* v. *Norris*, 1.

2. If the drawee in a bill of exchange be insolvent at its date, the drawer is liable without diligence. *Id.*

3. Suit to the first term is a substitute for presentation, protest and notice; and where the latter is excused, it is not necessary to bring suit to fix the liability of the drawer. *Id.*

4. In a suit upon notes executed for land and secured by the vendor's lien, and against the maker of the notes in possession of the land, if defects of title to the land, plead in defense, be removed by plaintiff or others before the trial, the plaintiff may recover. *Keep* v. *Simpson*, 203.

5. The liability of an endorser on a promissory note falling due in 1862 or 1863 was fixed by the institution of suit in 1865, at the second term of the court held after the courts were opened by the proclamation of Provisional Governor Hamilton, and by showing good reason for not bringing the suit the term before. *McGary's Executor* v. *McKenzie*, 216.

6. The liability of the endorser under such circumstances is not affected by the fact that the holder could have fixed his liability at an earlier day by demand, protest and notice. *Id.*

QUI TAM ACTION

Necessary to enforce violations of stock law of twenty-second of May, 1871. *Garcia* v. *The State*, 543.

QUIT-CLAIM DEED.

EVIDENCE, 20.

RECOGNIZANCE.

BAIL BOND.

REGISTRATION.

LAND, 8.

NOTICE, 1.

RES ADJUDICATA.
DIVORCE.

RES GESTÆ.
EVIDENCE, 15.

SCIRE FACIAS.
CONTEMPT, 4. PLEADING, 5, 6, 7, 8.
OFFICES, 2. PRACTICE, 8.

1. It is not an answer to a *scire facias* upon a forfeited bail bond, that the defendant had been arrested, tried and convicted of another felony subsequent to the execution of the bail bond, and had escaped from custody. *Wheeler* v. *The State*, 173.

2. Should the defendant, after conviction, be retained in custody, the fact, if pleaded, would be an answer to the *scire facias*. *Id.*

3. A writ of *scire facias* upon a forfeited bail bond should show when, where and by what authority the bail bond was taken. *Cushman* v. *The State*, 181.

4. The *scire facias* should correctly describe the bail bond, and a defect in a material matter will be fatal on appeal from the judgment final. *Id.*

5. Where part of a county is detached and the cases sent to the new county, and bail bond in such transferred cases forfeited, the *scire facias* should state the facts necessary to show the connection between the bond and judgment *nisi*. *Id.*

6. There is no time fixed by law for the filing of the bail bond; it is sufficient if it be in court and on file before trial. *Cundiff* v. *The State*, 641.

SERVICE OF CITATION.

1. The return of a sheriff that he executed process "by delivering to the within named A. B., in person, a certified copy of this writ, and a copy of petition," without stating what petition, is not sufficient. *Tullis* v. *Scott*, 537.

2. See opinion for a state of case in which the judgment against one sued for wrongful seizure and conversion of goods, was not sustained by the evidence. *Id.*

3. A sheriff's return is sufficient showing that he had delivered to C. D., in person, one of the defendants, a copy of the citation and the accompanying certified copy of plaintiff's petition. *Brown* v. *Hunter*, 626.

SHELLEY'S CASE (*Rule in*).
CONSTRUCTION, 2.

SHERIFF.

To render a sheriff responsible for not making money on an execution it is necessary to prove that the execution had been placed in his hands,

SHERIFF—*Continued.*

and that while in his hands he had been required to make a levy when it was in his power to do so, and that he had failed to make such levy. *Lyendecker* v. *Martin*, 287.

SHERIFF'S RETURN.

SERVICE OF CITATION.

SHERIFF'S SALE.

EVIDENCE, 2.

SUBROGATION, 1.

Where the time and place of a public sale are prescribed by law, the sheriff has no authority to sell at any other time or place; and should he do so, his acts are not merely irregular, but void, and confer no title. *Grace* v *Garnett*, 156.

SPECIFIC ARTICLES.

CONTRACT, 6.

PLEADINGS, 4.

SPECIFIC PERFORMANCE.

LAND, 4, 6.

STATE TREASURER.

OFFICER AND OFFICES, 1, 2.

STATUTE OF FRAUDS.

LAND, 4.

STATUTES OF LIMITATION.

CONSTITUTIONAL LAW, 1.

Land laws conferring title by prescription are statutes of limitation, and come within the principle of the 43d Section of 12th Article of the Constitution. *Bentinck* v. *Franklin*, 458.

STOCK LAW.

CRIMINAL PROCEDURE, 2, 3, 4.

INDICTMENT, 5, 6.

SUBROGATION.

ESTATES OF DECEDENTS, 4.

HOMESTEAD, 16.

1. Though one who purchases real estate at a sheriff's sale, made after the term to which the execution is returnable, where no writ of *venditioni exponas* has issued, acquired no title, yet, if there be no fraud in the purchase, he will not be compelled to restore the property until he is reimbursed the amount paid by him, and which went to discharge the judgment. *Johnson* v. *Caldwell*, 217.

SUBROGATION—*Continued.*

2. The security upon an error-bond sued out by *one* of several joint defendants, paying the debt after the judgment had been affirmed, is subrogated to the rights of the plaintiffs as against *all* the defendants. *Taul* v. *Epperson*, 492.

TAXES.

1. Whenever a tax is authorized by law, and no special provision is made as to the source from which the revenue is to be derived, the law implies that the tax shall be levied upon all property subject to general taxation, and collected as other taxes. *The State* v. *Bremond*, 116.

2. The legislative power may confer upon local corporations the power to assess taxes for particular specific purposes, and the school directors must be regarded as civil corporations. *Id.*

3. Irregularities in assessments, when not resulting from fraud, will not render the taxes founded upon such assessments void. *Id.*

4. The third section of the act of August 13, 1870, requiring the boards of school directors to levy and have collected, when necessary, an *ad valorem* tax on all taxable property of the county, not exceeding one per cent., was in force and applicable to assessments made in 1871. *Id.*

5. The 11th Section of the act supplementary to the act to incorporate the Buffalo Bayou, Brazos and Colorado Railway Company, passed July 27, 1870, construed in connection with the 12th Section of the charter of the International Railroad Company, does not exempt the first mentioned corporation from the payment of taxes to the State. *G. H. & S. A. R. W. Co.* v. *The State*, 224.

TELEGRAM.

Telegrams communicating an offer and accepting the same, when acted on, form a contract governing the acts of the parties under the stipulations. *Duble* v. *Batts & Dean*, 312.

THEFT.

EVIDENCE, 17, 18.

TRESPASS TO TRY TITLE.

LAND, 14.

1. It is error in a judgment for plaintiff, in a suit of trespass to try title, to award a writ of possession against persons other than defendants, who have entered upon the premises recovered prior to the institution of the suit. *Jones* v. *Burgel*, 396.

2. In trespass to try title, either a legal or equitable defense, which amounts to an estoppel, may be offered in evidence without being specially plead. *Johnson* v. *Byler*, 606.

3. A claim for improvements made in good faith will not be sustained by proof of mistake as to the boundary lines of the land claimed, unless carelessness be excluded. *Nesbitt* v. *Walters*, 576.

TRESPASS TO TRY TITLE—*Continued.*

4. That one of the links in the chain of title of the defendant in possession is a quit-claim deed, when his deed and that of his vendor are warranty deeds, does not prevent his recovery upon his plea of *bona fide* purchaser, upon proof of the other requisites of such defense. *Graham* v. *Hawkins*, 628.

5. Against a defendant in possession holding under a warranty deed from a vendor who also claimed under a deed with warranty, it is error to charge the jury that the recitals in a quit-claim deed (of a remote vendor) were evidence of a prior unregistered conveyance (not recited in the same), as if such prior conveyance had been duly recorded. (The case of Burchard v. Rogers, 34 Texas, 441, limited.) *Id.*

6. Where an appeal is taken in a case of trespass to try title, and such appeal is dismissed, limitation runs from the date of the judgment in the District Court, and suit must be brought within one year thereafter, or the judgment becomes conclusive. *Martin* v. *Wayman*, 649.

7. If such final judgment be rendered during the minority of the plaintiffs, then limitation runs from the removal of such disability, by marriage of a female, or majority. *Id.*

8. Different disabilities cannot be tacked to prolong such exemption. *Id.*

9. Where both parties claim title under a common source, and plaintiff shows title from such common source, and that defendant is in possession, such evidence is sufficient, and it devolves upon the defendant to show either the nullity of plaintiff's deed, or prove a superior title in himself. *Stephens* v. *Hix*, 656.

TRIAL BY JURY.

CRIMINAL PROCEDURE, 1, 5, 7, 8, 9, 10, 11.

INFORMATION, 2.

PRACTICE, 15, 17.

1. On a trial for felony, no separation of the jury can be allowed, under Article 3070, Paschal's Digest, except with the consent of the party on trial; it is not within the power of his attorney to give such consent. *Brown* v. *The State*, 482.

2. When such separation takes place, every juror should be under the control of an officer, that no communication may be had with other persons with regard to the cause on trial. *Id.*

3. In a capital case, this court will ascertain whether there has been any violation of Article 3059, Paschal's Digest, though no exception may have been taken on the trial. *Id.*

4. No legal verdict can be rendered in a criminal cause by a jury composed of more than twelve men. *Bullard* v. *The State*, 504.

5. If a jury of more than twelve has been impanneled, and the last juror sworn can be pointed out during the trial, he may be dismissed from the panel and the trial proceed. *Id.*

TRIAL BY JURY—*Continued.*

6. Unless it appear affirmatively from the record that the jury was sworn on the trial in the court below, the judgment will be reversed. *Baird* v. *The State*, 599.

7. Parties have a right to trial by jury, and when a jury is demanded it is error in the court to dismiss the case upon a fact ascertained by the court from the report of an auditor. *Pfeiffer* v. *Maltby*, 523.

TRUSTS AND TRUSTEES.

ESTATES OF DECEDENTS, 13, 14.

MARITAL RIGHTS.

An agent in Texas, having property of his principal, even after the non-intercourse proclamation, would be chargeable with a trust therein; and should he sell such property, the principal, at close of the war, could enforce such contract against the purchaser with notice of all the facts. *McCormick* v. *Arnspiger*, 569.

VARIANCE.

Defendant was indicted for an assault upon one Persons; *held*, the omission to add the final letter to the name of Persons not such a change in the name as would vitiate the indictment. *Hart* v. *The State*, 382.

VENDOR AND VENDEE.

LAND, 6.

The fraudulent intent of the vendor in no way affects the title of the *bona fide* purchaser, and it is error to instruct the jury that the validity of a sale is dependent upon the intent of the vendor. *Shearon* v. *Henderson*, 245.

VENDOR'S LIEN.

1. The vendor's lien is not a creature of contract, but is an incident to a contract for the purchase of land, growing out of that specific kind of contract by operation of law. *Malone* v. *Kaufman*, 454.

2. When the vendor of land takes personal security other than the bill or note of the vendee for the purchase money, he is held to have abandoned his vendor's lien. *Cannon* v. *Bonner*, 487.

3. A mortgage made by the vendee who has given such other personal security to secure the purchase money, is construed only as a mortgage, and not as evidence of the vendor's lien; and if not signed and acknowledged by the wife, does not subject the land to the debt as against the homestead rights of the wife. *Id.*

VERDICT.

PRACTICE, 10.

TRIAL BY JURY, 4.

1. A verdict of guilty of assault with "attempt to murder," on an indictment for assault with intent to murder, is sufficiently definite to render judgment upon. *Hart* v. *The State*, 382.

VERDICT—*Continued.*

2. On a trial for murder a general verdict of "guilty," which does not find in terms the degree of murder, but assesses the punishment at hard labor in the penitentiary for life, is sufficient to support the judgment. *Holland* v. *The State*, 474.

VESTED RIGHT.

Statutes of limitation have reference to the remedy, and do not, in any sense, confer a vested right. *Bentinck* v. *Franklin*, 458.

WILL.

CONSTRUCTION, 1, 2, 3, 4.
ESTATES OF DECEDENTS, 2.
GUARDIAN AND WARD, 3.

1. A will, where the attesting witnesses are all interested, is not therefore void. The probate of the will by a witness, who releases the legacy, is valid as to all of the will save as to the legacies to the subscribing witnesses. *Nixon* v. *Armstrong*, 296.

2. The will so proven is void as to the legacies to the subscribing witnesses. *Id.*

3. By credible witness is meant a competent witness. *Id.*

4. Construction of a clause in a will, see this case. *Alexander* v. *Thompson*, 533.

WITNESS.

EVIDENCE.
WILL, 3.

By credible witness is meant a competent witness. *Nixon* v. *Armstrong*, 296.

WRIT OF ERROR.

1. The statute fixing the time for the prosecution of writs of error to the Supreme Court within two years of the rendition of judgment, is not a law of limitation. *Hart* v. *Mills*, 513.

2. A writ of error is not a new or original suit, but a continuation of the original cause, and the affirmance of a judgment in the Supreme Court recognizes the validity of the judgment from the date of its rendition in the District Court. *Id.*

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